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2550
No. 12038

United States
Court of Appeals
for the Ninth Circuit

JOHN E. HUMES,

Appellant,

vs.

ALASKA TRANSPORTATION COMPANY,
a corporation,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

OCT 16 1948

PAUL P. O'BRIEN, \

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

J. DUANE VANCE of

Messrs. Bassett & Geisness,
811 New World Life Building,
Seattle 4, Washington,

Proctors for Appellant.

PENDLETON MILLER and
ALBERT E. STEPHAN of

Messrs. Grosscup, Ambler & Stephan,
711 Central Building,
Seattle 4, Washington,

Proctors for Appellee. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

ACCOUNT OF WAGES RECEIVED BY REGISTERED SEAMEN

Name of Vessel	MS CLOVE HITCH	Official No.	246847	Port of Registry	Los Angeles, California	Master	Chris Rosa
Description of Vessel or Engagement	Intercoastal						

1. Includes all earnings, whether bonus, overtime, etc. Where no balance due, insert words "no balance due."
2. Taken from official log or payroll. Includes slops, advances, fines and other proper charges.
3. See detail below for list of effects and proceeds from each item sold, if any.

Endorsed:
FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
JUN 11 1948
MILLARD P. THOMAS, Clerk
By J. Koerner Deputy

Port Seattle, Washington Agent's Signature Eno O. Swordmaker Date 24 May 1948

Post Seattle, Washington. Shipping Commissioner C. W. Hendrickson Date 14 May, 1948

WESTERN DISTRICT Port Seattle, Washington Date 14 May, 1948

Shipping Commissioner Leroy E. Kuhns

Shipping Commission Leroy E. Kuhns

Clerk of the Court Millard P. Thomas J. W. Koerner, Deputy.

Clerk of the Court Millard P. Thomas J. W. Koerner, Deputy.

In the District Court of the United States for
the Western District of Washington,
Northern Division

No. 48-12(1)

In the Matter of the Application of JOHN E.
HUMES, Alleged Deserting Seaman, for With-
drawal of Wages.

No. 48-12(2)

In the Matter of the Application of PHILIP J.
McKANNA, Alleged Deserting Seaman, for
Withdrawal of Wages.

Before The Honorable John C. Bowen, District
Judge.

Seattle, Washington
May 15, 1948, 10:00 a.m.

COURT'S DECISION

The Court: I do not think either of these petitioners, Mr. Humes or Mr. McKanna, had sustained the burden of their allegations in their petitions. On the other hand, I believe the ship owner or operator has sustained any burden cast upon it respecting the issues framed as to whether or not these men left this ship justifiably or unjustifiably, and further as to whether or not they were specifically guilty of desertion of the ship.

So far as I know, or has here been shown, Articles calling for service by the crew for this voyage remaining uncompleted at Skagway were then still binding upon both parties to the Articles,—the

members of the crew on the one hand and the operators or owners of the ship on the other. Both parties are bound according to the terms stated in the contract. Neither is entitled to terminate [3] the contract without just cause. That applies to both sides. These two men, in my opinion, got scared by health conditions up there and I think they were not justified in getting scared. I think after they got these colds each of these two men decided that he didn't want to pursue the remainder of this voyage and he was willing to suffer the consequences of wrongful termination by him of his part of the contract in order for him to escape the performance by him of the remainder of his contract for that part of this voyage from Skagway to Texas ports. These men did not turn out to have any serious health conditions that could not have been properly treated and dealt with if they had remained on board the Clove Hitch, where they were supposed to serve pursuant to their articles. The Court does not believe that the ship was not provided with sufficient medicine kit to take care of any ordinary colds conditions.

The conduct of these two petitioners, Mr. Humes and Mr. McKanna, during the next two to five days after they left the Clove Hitch at Skagway, does not justify the contention of either one of them that the facilities on board the Clove Hitch for treating their colds were inadequate. Mr. Humes took an airplane to Seattle. He did not call upon a doctor immediately upon coming to Seattle nor go to a hospital in Seattle. He went home and went to bed,

and stayed there from Thursday until Monday, and then he went to see a doctor. He could have done the same thing aboard the Clove Hitch. He could have stayed in his bunk or he could have gone to sick bay. There isn't any question in my mind on the proof here that there was an adequate ship's bay provided on the vessel.

So far as the Petitioner McKanna is concerned, he went on board the Princess Nora as a passenger and he went [4] to his room where he stayed for about three days while the vessel was proceeding to its destination in Vancouver, B. C., and that he got some medicine from the stewardess during that voyage. He did not do anything more in the treatment of his cold for virus X or whatever it was he had than he could have conveniently done if he had stayed on board the Clove Hitch. However, I will say this, in mitigation of their attitude and their conduct, that probably each one of them did get scared about this virus X although their attitude was not justified in fact. In view of that mitigation, it is the finding, conclusion and decision of the Court that although both of these men were as logged deserters when they left their ship the Clove Hitch and repudiated their articles to serve on that ship for the remainder of the voyage she was then on, they should not be required to forfeit all of their unpaid wages but only a part of their wages. And the Court decides that each shall as a penalty for such desertion forfeit \$200 of his unpaid wages and that the balance, after deducting from the unpaid amount that \$200 forfeit shall be paid to each of these men from the amount of wages now in the

registry of this Court. Stated another way, each shall forfeit \$200 of the unpaid wages which are on deposit for his account in the registry of this Court. In the case of Humes, after such deduction the remainder of \$153.86 shall be paid to him. As to the Petitioner McKanna, after such deduction, \$183.81 shall be paid to him.

Is there anything not covered as to these two cases?

Mr. Egger: The Clerk has some statutory fees which amount to 75 cents or \$1.00 each. Do I understand that the money shall be returned less those statutory fees?

The Court: Do you advise that the Court has no [5] authority in law to order that those clerk's fees be not deducted from the remainder in each case?

Mr. Egger: No, I do not advise that.

The Court: It is the Court's preference not to provide that the Clerk shall have any of these fees on this occasion; and that unless you later advise that the law prohibits the Court from so ordering, the order of the Court will be that no fees be paid to or collected by the Clerk on account of this proceeding as to each of these petitioners.

Concluded.

[Endorsed]: Filed May 26, 1948. [6]

In the District Court of the United States for
the Western District of Washington,
Northern Division

No. 48-12(1)

In the Matter of the Application of JOHN E.
HUMES, Alleged Deserting Seaman, for With-
drawal of Wages.

ORDER FOR PAYMENT OF WAGES

This matter having come on before the Court for hearing on the application of John E. Humes, alleged deserting seaman, for the return of wages in the sum of \$353.86 heretofore deposited in the registry of this Court by the United States Shipping Commissioner, and the Court having heard the evidence presented by the petitioner and the steamship company and the Deputy United States Shipping Commissioner and being in all things advised and having found that the petitioner did desert his ship as charged but that there were mitigating circumstances and that the petitioner should forfeit \$200.00 of the money on deposit which is to be paid into the Treasury of the United States for the relief of sick and disabled seamen belonging to the United States Merchant Marine Service and the Court having found that the balance of the money on deposit should be returned to the petitioner, now, therefore,

It Is Hereby Ordered that the clerk of this Court draw checks upon the registry as follows:

To John E. Humes.....	\$153.86
To Clerk, U. S. District Court, forfeiture...	200.00
<hr/>	
Total.....	\$353.86

It Is Further Ordered that the sum of \$200.00 which has been forfeited be transmitted in the usual manner to the Treasurer of the United States in accordance with the provisions of Sections 628, 701, 706, Title 46, U.S.C., for the [7] benefit of sick and disabled and destitute seamen belonging to the United States Merchant Marine Service, to all of which petitioner excepts and his exceptions are allowed.

Dated at Seattle, Washington, this 17th day of May, 1948.

JOHN C. BOWEN,
United States District Judge.

Presented by:

J. DUANE VANCE,
Of Counsel for Petitioner.

(Duly Verified.)

[Endorsed]: Filed May 15, 1948. [8]

[Title of District Court and Cause.]

NOTICE OF GENERAL APPEAL

Sirs:

Please take notice that John E. Humes, the petitioner in the above entitled cause, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this court entered herein the 17th day of May, 1948, and from each and every part of said decree.

Dated this 11th day of August, 1948.

BASSETT & GEISNESS,
Proctors for Petitioner.

To Grosseup, Ambler & Stephan

ORDER ALLOWING APPEAL

It Is Ordered that the appeal herein be allowed as prayed for and that the bond on appeal be fixed in the sum of \$250.00 and run to all appellees, said bond to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Done In Open Court this 11th day of August, 1948.

JOHN C. BOWEN,
U. S. District Judge.

Received Aug. 11, 1948. Grosseup, Ambler & Stephan.

[Endorsed]: Filed Aug. 11, 1948. [9]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The petitioner John E. Humes hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

First, the District Court erred in holding that the petitioner was guilty of desertion;

Second, the District Court erred in holding that the petitioner left his ship without justification;

Third, the District Court erred in assessing an excessive penalty under the circumstances.

Dated at Seattle, Washington, this 11th day of August, 1948.

BASSETT & GEISNESS,

Proctors for Petitioner.

Received Aug. 11, 1948. Grosscup, Ambler & Stephan.

[Endorsed]: Filed Aug. 11, 1948. [10]

General Casualty Company of America

Seattle, Washington

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men By These Presents, That we, John E. Humes, as Principal, and the General Casualty Company of America, a corporation organized and

existing under the laws of the State of Washington, having its principal office at Seatttle, Washington, and authorized to do business in the State of Washington, as surety, are held and firmly bound unto the United States of America and the Alaska Transportation Company in the sum of \$250.00 to be paid to the said United States of America or the Alaska Transportation Company, or the assigns of either of them, for the payment of which well and truly to be made we bind ourselves, and each of us, and each of our heirs, executors and administrators, jointly, and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of August, 1948, and

Whereas, John E. Humes, as Petitioner, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the District Court of the United States for the Western District of Washington, Northern Division, bearing the date of the 17th day of May, 1948, in a suit in which the said John E. Humes is the Petitioner, for the withdrawal of wages, which decree orders the said John E. Humes to forfeit to the Clerk of the United States [11] District Court the sum of \$200.00 of the wages theretofore paid into said District Court; and

Whereas, the said John E. Humes desires during the progress of such appeal to stay the execution of said decree of the District Court:

Now, Therefore, the condition of this obligation is such that if the above named appellant, John E. Humes, shall prosecute said appeal with effect and

pay all costs which may be awarded against him as such appellant if the appeal is not sustained and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause or on the mandate of said Court by the court below, then this obligation to be void. Otherwise the same shall be and remain in full force and effect.

JOHN E. HUMES,
BASSETT & GEISNESS.

By /s/ J. DUANE VANCE,
Proctors for Appellant.

(Seal) GENERAL CASUALTY COM-
PANY OF AMERICA,

By /s/ ALBERT McCARTHY,
Attorney-in-Fact.

(Duly Verified.)

[Endorsed]: Filed Aug. 18, 1948. [12]

[Title of District Court and Cause.]

MOTION FOR ORDER OF TRANSMITTAL OF
ORIGINAL EXHIBITS ON APPEAL

Comes now the Petitioner herein, John E. Humes, and moves the Court for an order directing the Clerk of the Court to transmit to the United States

Circuit Court of Appeals for the Ninth Circuit all original exhibits in this cause for use on the appeal now pending therein.

BASSETT & GEISNESS,

By J. DUANE VANCE,
Proctors for Appellant.

ORDER FOR TRANSMITTAL OF ORIGINAL
EXHIBITS ON APPEAL

This matter having come regularly before the Court on the above motion, It Is Hereby Ordered:

That the Clerk of the District Court herein shall forward to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit all original exhibits in the above entitled cause for use on the appeal herein.

Done In Open Court this 18th day of August, 1948.

JOHN C. BOWEN,
U. S. District Judge.

Presented by:

J. DUANE VANCE,
of Proctors for Appellant.

(Duly Verified.)

[Endorsed]: Filed Aug. 18, 1948. [13]

[Title of District Court and Cause.]

PRAECIPE

To Millard P. Thomas, Clerk of the United States
District Court for the Western District of
Washington:

We hereby request that the record on appeal in
the above entitled case shall include the following:

1. Account of Wages.
2. Testimony of all witnesses.
3. All exhibits.
4. Order for payment of wages 48-12(1).
5. Court's oral opinion.

BASSETT & GEISNESS,
Proctors for Petitioner.

Received Aug. 11, 1948. Grosseup, Ambler &
Stephan.

[Endorsed]: Filed Aug. 11, 1948. [14]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF APOSTLES ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States
District Court for the Western District of Wash-
ington, do hereby certify that the foregoing type-
written transcript of record, consisting of pages
numbered 1 to 14, inclusive, is a full, true and com-

plete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Praeceptum of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Testimony, the original of which is sent up as part of this record, constitute the apostles on appeal from the order of payment of wages of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated May 17, 1948.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing record on appeal herein, to wit: [15]

3 Pages at 10c.....	\$.30
10 Pages at 40c.....	4.00
Notice of Appeal.....	5.00
<hr/>	
Total.....	\$9.30

I further certify that the above amount has been paid to me by the proctor for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 10th day of September, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk. [16]

In the District Court of the United States for
the Western District of Washington,
Northern Division

In Admiralty—No. 48-12(1)

In the Matter of the Application of JOHN E.
HUMES, Alleged Deserting Seaman, for With-
drawal of Wages.

Before: The Honorable John C. Bowen,
District Judge.

Seattle, Washington

May 14, 1948, 4:00 o'clock p.m.

Appearances: John Geisness, Esq., and J. Duane Vance, Esq. (Messrs. Bassett & Geisness), Proctors for Petitioner. Pendleton Miller, Esq. (Messrs. Grosscup, Ambler & Stephan), Proctors for the Steamship Company. Truman Egger, Esq., Chief Deputy Clerk, United States District Court. [1*]

PROCEEDINGS

(Counsel for the steamship company, Pendleton Miller, not present during the following proceedings.)

The Court: Will you state the reason for proceeding in these matters this afternoon instead of tomorrow morning, if there is any reason?

Mr. Egger: John E. Humes and Philip J. McKanna, the two seamen, are in court with their attorney, Mr. J. Duane Vance.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: Why are they here today?

Mr. Egger: They ask the court to consider their petition for the return of moneys paid into court by the Shipping Commissioner on the charge of desertion.

Mr. Vance: I was called by these gentlemen today. They had previously talked to us some time before, if Your Honor please. Hearings were held yesterday before the Deputy Commissioner and they were ordered to report again today for full hearings before the Commissioner at noon. The Commissioner at that time advised that he would refer the matter to Your Honor.

The vessel on which this incident occurred, and the witnesses for the Steamship Company being on that vessel, that vessel is sailing at 5:00 o'clock [2] this afternoon. If the hearing were not held at this time, if the Court please, the Steamship Company might say it was denied the right of representation.

The Court: You may proceed with that hearing as to those persons situated and affected by that ship movement.

Is the Shipping Commissioner here?

Mr. Egger: He is here, Your Honor.

The Court: Have him come forward and be sworn.

Mr. Egger, will you ask the witness what you think is within the witness' knowledge that you believe to be material here?

Mr. Egger: Yes, Your Honor.

R. H. COTTERILL

called as a witness, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Egger:

Q. What is your name?

A. R. H. Cotterill, Deputy Shipping Commissioner.

Q. Do you have in your possession the full log books of the Shipping Commissioner? [3]

A. I do.

Q. Would you read to the court that portion of the log book entries which refer to the charge of desertion on the vessel on which these men were working?

A. The first is dated "March 10th, 1948, Port of Skagway, Alaska, 1:00 p.m. February 19th, 1948 as A.B. for a voyage from the Port of Seattle, Washington, to a United States port or ports in the Gulf of Mexico, via Alaska and other United States ports and such other ports and places in any part of the United States, Atlantic and/or Gulf Coast and/or Alaska as the Master may direct and back to a Pacific Coast port of discharge in the United States at the discretion of the Master for a term not exceeding the calendar months.

"10:00 a.m., March 9th, 1948 at the Port of Skagway, Alaska, John E. Humes demanded to be paid off in full at that port. This demand was refused as there were no suitable replacements available.

(Testimony of R. H. Cotterill.)

And at about noon of that day John E. Humes took his personal belongings ashore and he did not return to the vessel. He is hereby declared a deserter with penalties as the applicable laws permit." This is signed by Chris L. Ross, Master, and witnessed by R. L. Way, Chief Mate. [4]

There is an attachment to the next page which is referred to on the preceding page. It purports to be a copy of a letter. It says, "Original letter retained in company's voyage file. Dated 3-9-48. Captain Ross, SS Clovehitch, regarding one John Humes, Able Seaman and Lookout.

"He visited my office March 8th, 1948, complaining of cold in head and aches over body. On examination he was found to have no temperature but as we have had an epidemic of virus flu I suggested that he go to bed and stay there until such time as his temperature was normal. He informed me he could not do so as there was no Sick Bay and would not go to the local hospital. He asked me to write a note so he could catch a boat on the way south. Evidently he misrepresented the facts in the case and I now realize I was 'taken in' and should not have given this note. There was a decided alcoholic odor to his breath when he consulted me."

That is all in the log book on this matter that pertains to Mr. Humes. This is the entry on Mr. McKanna—* * *.

Those are the only entries in the official log pertaining to this matter.

(Testimony of R. H. Cotterill.)

The Court: There has been something handed to [5] me, filed in this court as a part of these proceedings on May 14th. I believe it purports to be an excerpt from the log.

Mr. Egger: It is the account of the United States Shipping Commissioner, showing the minutes turned over by him to our office which are now held in the Registry of the Court.

The Court: Let Mr. Vance see that.

Does that correctly reflect the moneys in question?

Mr. Vance: We agree, may the Court please, that it is at least approximately correct.

The Court: Let that be received as a part of the files and records in this case.

The Witness: These are copies of the account, and the two information sheets on which I took down the information at the time on this ship and attached it to the account.

The Court: Has it been customary in other cases to file it in the case?

The Witness: It is brought up for the Judge to examine and to use in the case. It is an information sheet. There are two of them.

The Court: Is there any reason why the information sheet should not be received in the files and [6] records of this case?

The Witness: Well, it may be used in the case but it is part of the files of the Shipping Commissioner's office.

Customarily, when this is used, it is always re-

(Testimony of R. H. Cotterill.)

turned to the Commissioner's office, back to the Commissioner's office.

The Court: You didn't make an extra copy of it?

The Witness: That hasn't been the custom, Your Honor. It is brought up for us and then, when the case is decided, returned.

The Court: Is there anything else which you wish to call attention to?

The Witness: Well, regarding this matter I would like to explain—I went down to the ship to pay it off, and normally when there is a desertion on board we simply take up the account and we take down on this information sheet for the Court's reference matters that we can find out. But in those cases ordinarily the seamen are not present. But in this case yesterday both of these men were present and they both protested the manner in which they were logged as deserters. There was a great deal of charges and counter-charges back and forth to the extent that I decided it was advisable to postpone [7] the receiving of this account and I requested all of the parties to come up to the Shipping Commissioner's office the next day and I would refer this matter to the Chief Deputy.

I wrote up these information sheets with everything I could remember and take down in notes of these various accusations that were made on both sides, and turned them over to the Chief Deputy this morning. The Chief Deputy examined

(Testimony of R. H. Cotterill.)

all of this information and he decided it was a matter for the court, and he called for the seaman's account—pardon me, I have a bad cold—and the account was brought up, and it was forwarded and turned over to the Court in the usual manner for the disposition of the Court.

The Court: What is it that was turned over to the Court in the usual manner?

The Witness: The money, the account, and the records are available for the Court's use in this case. They are quite lengthy, here, the statements made by both parties. [8]

Cross Examination

By Mr. Vance:

Q. Did you not set the time for this hearing at noon today?

A. That was what I told all of these gentlemen, Captain Ross and Mr. Swordmaker.

Q. Were there any representatives of the company present at noon today?

A. Not at noon. Mr. Swordmaker brought in the account when he was requested to do so and turned over the account. I wasn't in a position to notice who all came and went. I do know that Mr. Swordmaker came in and turned in the account because I typed it up and was there at the time. I don't believe anyone else was in but I wouldn't say that for a fact.

Q. Mr. Cotterill, were any documents turned over to you by these seamen—original documents?

(Testimony of R. H. Cotterill.)

A. They were shown to me by Mr. Humes a number of papers which I noted on my information report for the Court's use.

Q. Was an original letter from the doctor at Skagway turned over to you by Mr. Humes?

A. I copied it and gave it back to him. I have the text [9] of it here.

Q. You copied that letter?

A. I copied it for this information sheet.

Q. You do not have the original?

A. No, I don't have the original.

Mr. Vance: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Is there anybody here on behalf of the shipowner? Did anybody tell the shipowner that there was going to be any evidence taken in this case this afternoon?

Mr. Egger: I have not, Your Honor. I am following the procedure had in similar hearings.

The Court: In other hearings there have been representatives of the shipowners to tell their side of the story.

Mr. Egger: I didn't do that.

The Court: Did you do that?

The Witness: No, I did not, Your Honor.

The Court: This Court doesn't proceed in star chamber but in open court and both sides have a

chance to produce testimony. Of course, if one side [10] or both sides does or do not take advantage of that opportunity, the court may eventually have to decide the case without the testimony.

Mr. Vance: If the Court please, I wondered about that point. I was only called at 1:00 o'clock and told that this hearing was scheduled.

The Court: I am satisfied the only reason you were told that was to try to accommodate your clients.

Mr. Vance: I believe that is true, Your Honor. I assume the fact that the employer failed to show at the hearing set by the Deputy Commissioner, I assumed this was a continuation of that hearing.

The Court: The only reason the Court is interrupting this trial to hear this matter is because of the allegations, the statements that have been made that these men may lose some evidence which they are entitled to have. By these men I mean your clients, these seamen. Tomorrow morning was set for the hearing of these matters. If I cannot hear the evidence on both sides there will be no decision today. I can tell you that now.

Mr. Vance: Does Your Honor care to hear the evidence?

The Court: I wish to hear all of the evidence that is available now and I will see what the situation [11] is.

Mr. Vance: Mr. Humes.

JOHN E. HUMES,

called as a witness by and on behalf of Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Vance:

Q. Will you state your name?

A. John E. Humes.

Q. You signed aboard this vessel on February 19th, 1948 for a trip to Alaska and thence to the Gulf port, did you? A. Yes.

Q. How long was the vessel in Skagway, Alaska?

A. I was on it for two weeks in Skagway, there.

Q. What was the vessel doing there?

A. Loading cargo.

Q. During the time that you were there, did you have any difficulty? A. Yes. I was sick.

Q. What do you mean you were sick? [12]

A. Well, it was cold there and I was driving winches all day long. The wind was blowing right down the dock there and I got the flu or something.

Q. Did you talk to anybody aboard the vessel about that? A. Yes.

Q. Who did you talk to?

A. I talked to the purser. I asked for a hospital slip, and he said, "You don't need one."

Q. How many times did you ask him for a hospital slip?

(Testimony of John E. Humes.)

A. Twice—on two different days.

Q. Did you ask the Captain about it?

A. Yes. And he said, "The purser takes care of that."

Q. Then what did you do about that?

A. Well, I went to see the doctor.

Q. What doctor did you go to see?

A. I think his name is Dahl—the Skagway railroad doctor there.

Q. What did he do for you?

A. Well, he gave me some sulpha pills and told me that I should take it easy and rest. I asked him about going back to Seattle and he said, "Yes it would be a good idea."

Q. Did he give you a letter at that time?

A. He did.

Q. Do you have that letter? [13]

A. I haven't it right here. I have it on the ship that I am on right now.

Q. What did he say in that letter?

A. He said that I needed a lot of rest and it would be advisable to go back to Seattle.

Q. Incidentally, Mr. Humes, was anybody else ill along about that time?

A. Yes, there were several of the crew members.

Q. Anybody else?

A. Mr. McKanna was.

Q. Was anybody besides the crew members ill?

A. Oh, yes; 75 per cent of the town was.

Q. With what?

(Testimony of John E. Humes.)

A. Well, Dr. Dahl said it was virus flu and I guess that is what it was.

Q. So what did you do about that?

A. Well, I came back to the ship and told the Captain I wanted to go to the hospital. He says, "You can't." I said, "Well, I want to go back to Seattle," and he told me I couldn't do that either.

Q. So what did you do?

A. So I packed enough of my clothes to take me back to Seattle, and I came back to Seattle.

The Court: How did you come?

The Witness: I flew down. [14]

The Court: You had money enough to fly back?

The Witness: Yes.

Q. (By Mr. Vance): Did you demand any pay from the Captain?

A. Yes. I asked him for transportation money down.

Q. What did he say to that?

A. He says, no, he wouldn't give it to me.

Q. Mr. Humes, when you signed on the vessel—what was the name of that vessel?

A. Clovehitch.

Q. Where was it bound for?

A. Alaska and Texas, somewhere—they didn't know for sure.

Q. Do you know where the vessel was bound for from the Port of Skagway?

A. Not definitely. We knew it was Texas.

Q. Going to Texas? A. Yes.

The Court: How did you get along with your

(Testimony of John E. Humes.)

health on the way down; did you suffer any chills on the way down? The Witness: I did, yes.

The Court: How long were you confined to your home after you got to Seattle? [15]

The Witness: Two weeks.

Q. (By Mr. Vance): Did you receive any medical attention after you arrived in Seattle?

A. Yes.

Q. From whom?

A. Dr. Seth. I had oxygen treatments from him.

Q. Dr. Seth? A. Yes.

Q. Where are his offices?

A. In the Fourth and Pike Building.

The Court: What kind of doctor is he?

The Witness: He is a practicing doctor.

The Court: A physician?

The Witness: Yes, physician and surgeon.

The Court: Medical doctor?

The Witness: Yes.

Mr. Vance: I think that is all, Your Honor.

The Court: Does anyone else wish to ask this witness any questions?

Mr. Vance: There is one question I forgot to ask Mr. Humes.

Q. (By Mr. Vance): What vessel are you on now? A. The Rain Splice. [16]

Q. Are you loading? A. Yes.

Q. Are you going to leave out? A. Yes.

The Court: When?

The Witness: The 20th, Thursday.

(Witness excused.)

(Whereupon, the testimony of Philip J. McKanna was taken in evidence.) * * * *

(Short recess.)

Mr. Vance: If Your Honor please, I am sorry this incident occurred.

These men could have testified tomorrow but they felt that the Captain of the ship might have wanted to testify today.

The Court: It seems that it was not proper to have this hearing today piecemeal in this way without an opportunity being given to the people representing the ship to come in.

Unless you find out from some other source than that given here, I don't think the Court will [17] be able to decide for these men. I don't think the mere fact that we have an airplane service or rival steamship lines between here and Alaska, that members of the crew have a right to abandon a vessel just because they get a cold in Alaska.

In past years and in past generations few ships would run if men could have left the ship upon getting a cold—just because they had a cold. The ship is supposed to have some medicines.

Mr. Vance: The testimony before Your Honor is that they were refused treatment aboard the vessel.

The Court: That is not the only testimony. There is log book entry testimony here which indicates that these men without just cause left the ship.

I will be glad to hear any further testimony on the subject but that is the way it is reacting in the Court's mind upon the evidence which is before the Court now.

Men either ought to be seamen and stay with the ship in accordance with the contract which they make for a voyage or else they shouldn't go on the ship on such a contract.

I don't think these men showed a disposition to cooperate and carry out their contract like they should from the evidence now before the Court.

As I say, I will be glad to hear any further testimony that may be offered.

Mr. Vance: Will the Court continue the hearing until we can get some medical testimony on it?

The Court: I will continue this hearing until 10:00 o'clock tomorrow morning. I wish the steamship owner to be notified. I wish the operating department of that concern notified and advised that the Court will hear further testimony in this case tomorrow morning or, if there is some testimony available between 5:00 o'clock this afternoon and tomorrow, I will consider an application here, although it would be inconvenient for the Court to proceed further in this case this afternoon. But rather than lose any of the testimony on either side, I would consider that situation.

(At 4:20 o'clock, p.m., Friday, May 14, 1948, proceedings adjourned until 10:00 o'clock, a.m., Saturday, May 15th, 1948, in the United States District Court.) [19]

Seattle, Washington

May 15, 1948, 10:00 o'clock, a.m.

(All parties present as before with the addition of counsel for the Steamship Company, Mr. Pendleton Miller.)

The Court: I will proceed with the unfinished cases.

Those two cases are John E. Humes and Philip J. McKanna.

Mr. Vance, do you appear this morning for these petitioning seamen?

Mr. Vance: I do, Your Honor.

The Court: Is there anybody appearing for any other interest in the cases?

Mr. Miller: I am appearing at the request of the Court for the Alaska Transportation Company, so that the Company will be represented inasmuch as yesterday was more or less of an ex-parte hearing.

The Court: I wouldn't put it that way. The matters were continued until this morning with an opportunity for the operator of the vessel to present any testimony they so desired. The Court instructed that the operators of the vessel be notified to be able [20] to give testimony if they wanted to as well as the seamen.

Mr. Geisness: I am appearing with Mr. Vance on behalf of the seamen but not representing any other interests in the case.

The Court: What do you desire this morning?

Mr. Vance: We have some additional testimony to present, Your Honor.

The Court: You may produce it now.

JOHN E. HUMES,

recalled as a witness by and on behalf of the Petitioners, having been previously sworn, resumed the stand for further testimony as follows:

Direct Examination

By Mr. Vance:

Q. Mr. Humes, how long have you been going to sea? A. Sixteen years.

Q. Prior to March 9th, 1948, how long had you been serving aboard this ship, the Clovehitch?

A. Oh, thirteen and a half months, approximately—a [21] little over a year.

Q. Where had the ship gone during that year?

A. To Alaska.

Q. About how many times?

A. It must have made about fifteen trips when I was there—about that.

Q. Each time touching at an Alaska port?

A. Yes.

Q. And each time returning to Seattle?

A. Yes.

Q. During that 12 or 13 months, Mr. Humes, were you ever ashore on shore leave?

A. Yes.

Q. Were you on shore leave in Alaska?

A. No.

Q. At any time up there? A. No.

Q. When the ship was docked or loading or unloading? A. You mean was I ashore?

Q. Yes.

A. Well, just to go ashore to get a haircut or—

(Testimony of John E. Humes.)

The Court: What is the purpose of this line of inquiry, Mr. Vance?

Mr. Vance: I think I am about through with it, Your Honor. [22]

The Court: I mean what material bearing do these questions and answers have upon the issue here as to whether or not he had a right to the return of this money or is a deserter?

Mr. Vance: If Your Honor please, the evidence in the log book presented by the Deputy Commissioner was that they signed on this particular voyage February 19th, 1948 and the question, of course, before the Court is whether there was any justification or any appearance of justification for these seamen leaving the vessel.

From the evidence presented yesterday it might have appeared to the Court that these men were unwilling to serve in Alaskan waters or something of that nature.

This evidence is presented to show that these men had served aboard this particular vessel for a long period of time and had served in Alaska and, of course, would have no objection to such—

The Court: I meant those last questions and answers concerning his trips ashore.

Mr. Vance: That was just carrying out the further thought, if Your Honor please, that his going ashore in Skagway was nothing unusual; that is, that they do go ashore and had gone ashore on all of the [23] trips before.

Q. (By Mr. Vance): Mr. Humes, do you know

(Testimony of John E. Humes.)

of your own knowledge how long Mr. McKanna had served aboard the vessel?

A. The same length of time I had.

Q. Was the service of both you and Mr. McKanna continuous for that period of time?

A. No. We were off nine days time here in Seattle—nine days twice.

Q. You were off nine days twice in a period of approximately thirteen months, is that correct?

A. Yes.

Q. What was the nature of those periods—was that between voyages?

A. No. The Company laid the ship up.

Q. The Company laid the ship up for that period? A. Yes.

(Documents marked as Petitioners' Exhibits 1, 2, 3, and 4, for identification, respectively.)

Q. (By Mr. Vance): Mr. Humes, handing you what is marked as Petitioners' Exhibit 1, will you, without stating its contents, just state what it is?

A. Well, it is a letter from the doctor in Skagway. [24]

Q. Is that concerning your visit to him?

A. Yes.

Mr. Vance: I offer Petitioner's Exhibit 1.

Mr. Miller: No objection.

The Court: Admitted:

(Petitioners' Exhibit 1 received in evidence.)

(Testimony of John E. Humes.)

PETITIONER'S EXHIBIT No. 1

Phones: Res. 42, Office 53

Reg. No. 998

P. I. Dahl, M.D.

Skagway Surgeon, W. P. & Y. Ry. Alaska

Patient's Name.....

Address....., 194....

Capt. S.S. Clove Hitch: This man John Humes thinks he would feel better if he went to Seattle and caught the ship there. He has probably had this virus flu which always requires bed rest.

/s/ P. I. DAHL, M.D.

Take this Prescription to Keller Drug Co.. 3rd and Broadway.

Q. (By Mr. Vance): Without stating its contents, Mr. Humes, will you tell us what Petitioners' 2 is or purports to be?

A. It is a letter from my doctor here in Seattle.

Q. What is his name?

A. Dr. Raymond Seth.

Q. That is the doctor that you contacted when you first returned to Seattle? A. Yes.

Mr. Vance: May that be shown to opposing counsel.

(Document shown to Mr. Miller.)

I offer Petitioners' Exhibit 2.

Mr. Miller: No objection.

The Court: Admitted.

(Petitioners' Exhibit 2 received in evidence.)

(Testimony of John E. Humes.)

PETITIONER'S EXHIBIT No. 2

Raymond E. Seth, M.D.

Seattle, Washington

Mr. John E. Humes

May 14, 1948

1414 E. Denny Way

Seattle, Washington

Dear Mr. Humes:

This is to certify that Mr. John Humes was seen March 15, 1948 for a Virus X condition. At that time he presented symptoms and findings which are usually found. He was given penicillin and diathermy treatment March 15, 17 and 19, 1948.

/s/ R. E. SETH, M.D.

Q. (By Mr. Vance): Will you state in your own words what Petitioners' Exhibit 3 is?

A. This is a statement from the doctor when I was finished with this treatment and ready to go back to work.

Q. And what is Petitioners' Exhibit 4?

A. This is the bill that I paid for the treatments.

Q. A bill you paid to whom, Mr. Humes?

A. To Dr. Seth.

Q. Here in Seattle? A. Yes.

Mr. Vance: Will you show Exhibits 3 and 4 to Counsel?

(Exhibits 3 and 4 handed to Mr. Miller.)

Mr. Vance: We offer Petitioners' Exhibits 3 and 4.

Mr. Miller: No objection.

The Court: Each of them is now admitted.

(Petitioners' Exhibit 3 and 4 received in evidence.)

(Testimony of John E. Humes.)

PETITIONER'S EXHIBIT No. 3

Raymond E. Seth, M.D.
Seattle, Washington

March 19, 1948

To Whom It May Concern:

This is to certify that Mr. John E. Humes is able to resume his work.

/s/ R. E. SETH, M.D.,

RES/dn

929 Fourth & Pike Bldg.

PETITIONER'S EXHIBIT No. 4

Raymond E. Seth, M.D.
928-29 Fourth & Pike Bldg.
Seattle 1

Bills Rendered Monthly

Office: Eliot 4038

Mr. John E. Humes
1414 E. Denny
Seattle, Washington

To Professional Services: March, 1948

March 15	Office call treatment.....	\$ 5.00
March 17	Office call treatment.....	4.00
March 19	Office call treatment.....	5.00

\$14.00

Q. (By Mr. Vance): Mr. Humes, at the time you left the ship, do you know whether or not there was any more cargo to be loaded or discharged at that port in Alaska?

(Testimony of John E. Humes.)

A. Yes, there was some more to be loaded.

Q. Where? [26] A. In Skagway.

Q. Do you know how much? A. No.

Q. Was it to touch any other port?

A. Well, not that I know of.

Q. Do you know how long the vessel stayed in Skagway after you left?

A. Four or five days, I think.

Mr. Vance: You may cross-examine.

Mr. Miller: No questions.

The Court: Were you on the vessel about this season when the so-called virus X was supposed to be prevalent or known to be manifesting itself in illnesses,—did you find that in any other port where the ship may have been at such time?

The Witness: No. It never bothered me in any other port.

The Court: Had you been in any other ports before this ship called at Skagway?

The Witness: Yes.

The Court: What other Alaskan ports, if any?

The Witness: Ketchikan, Wrangell, Petersburg, Sitka, Pelican City.

The Court: On that voyage when the ship called at those cities, at the time you speak of—and have [27] in mind your last answer—what was the departure date from Seattle, do you recall?

The Witness: No, I don't.

The Court: Do you know how long it had been since the ship left Seattle, approximately?

The Witness: Oh, over three weeks.

(Testimony of John E. Humes.)

The Court: It had been gone from Seattle on this voyage over three weeks, you think?

The Witness: Yes.

The Court: Had you observed anyone else or had you heard of any other place where the vessel touched being affected, so far as the people's health was concerned, with this so-called virus X?

The Witness: No, I hadn't.

The Court: What date was it that you first went to see Dr. Dahl at Skagway, do you recall?

The Witness: Not the exact date. I know it was around, oh, the 8th or 9th of March. I think it was the 9th of March.

The Court: Do you recall the date that you left Skagway for Seattle on the conveyance you mentioned yesterday, which I believe was an airplane?

The Witness: Yes.

The Court: Do you remember the day of your departure from Skagway for Seattle on that trip?

The Witness: Yes.

The Court: What date was that?

The Witness: The tenth.

The Court: The tenth?

The Witness: I am not exactly sure but it was the day after I saw the doctor.

The Court: About the 10th of March, do you think?

The Witness: Yes.

The Court: Then when did you get to Seattle on that trip?

The Witness: The 12th.

(Testimony of John E. Humes.)

The Court: Then what did you do?

The Witness: Well, I stayed in bed at home until Monday morning and then I went to see the doctor.

The Court: Until Monday morning,—I do not have the related date of your arrival. You now switch from figures to days to indicate time. What day in the week did you arrive on that plane flight from Alaska to Seattle?

The Witness: Thursday.

The Court: And then the following Monday you did what?

The Witness: I started treatments at the [29] doctors.

The Court: In the meantime from Thursday to Monday you stayed in bed at home, is that your statement?

The Witness: I stayed right in bed at home.

The Court: You didn't have any advice or services from the doctor from Thursday until Monday?

The Witness: No, I didn't.

The Court: Were you trying to act upon such advice as you got from Dr. Dahl given you at Skagway?

The Witness: Yes.

The Court: Could you or could you not have followed that advice on board ship if you had stayed in your bunk on board ship?

The Witness: I suppose I could have.

The Court: Is there any reason why you might not have been permitted to—if you felt ill with a

(Testimony of John E. Humes.)

cold or with virus X—to have remained in your bunk or in your quarters on board the ship the same as you might have stayed in bed at home in Seattle?

The Witness: No.

The Court: Did you ever have a cold before this occasion while you were working as a seaman on ships on other voyages?

The Witness: Yes. [30]

The Court: How did they treat them?

The Witness: Toughed them out.

The Court: Were you ever permitted to stay in your quarters when you wished to treat a cold?

The Witness: No.

The Court: Did you ever ask to be relieved of your watch for the purpose of treating a cold?

The Witness: No.

The Court: How many years have you been going to sea as a merchant seaman?

The Witness: Sixteen years.

The Court: And during all of those sixteen years, before this occasion, in March that you are now speaking of, you never had occasion to stay in your quarters on account of a cold?

The Witness: No.

The Court: How did these symptoms manifest themselves in respect to this illness you had about the 9th or 10th of March, and from then on?

The Witness: Well, it was cold in Skagway.

The Court: The weather was cold?

The Witness: Yes. It was about 20 degrees.

(Testimony of John E. Humes.)

And the wind blows right down the dock there. We had to work driving winches,—had to sit and stand in the weather; ten hours one day and fifteen hours [31] two other days, every day. My nose ran continually.

The Court: Like a cold?

The Witness: Yes.

The Court: Did you have any signs or involvement of the chest with your cold?

The Witness: Yes.

The Court: How did that place of work at the winches on deck or in this wind at this port of Skagway on this occasion compare with other occasions when you were on board ship on Alaskan voyages; did you ever have to work winches in port in the wind on deck any other day?

The Witness: Oh, yes.

The Court: Do merchant seaman sometimes have to work in the wind on deck when they are engaged in active duty?

The Witness: Yes.

The Court: Does anyone else wish to ask any questions?

Q. (By Mr. Vance): Mr. Humes, did you have any other symptoms of illness?

A. Well, just this cold, virus X.

Mr. Vance: That is all, your Honor.

The Court: You may step down, Mr. Humes, [32] unless you believe there is something else you would like to say that you believe is material.

The Witness: Well, no, I haven't.

(Testimony of John E. Humes.)

The Court: You may step down then.

(Witness excused.)

The Court: May I ask of Counsel if you believe there is any witness who might at this particular time be feeling ill on account of the symptoms of a cold? The Court would be willing to accommodate him so that if he wished to go he would have an opportunity.

Mr. Vance: Mr. McKanna.

(The testimony of Philip J. McKanna was received in evidence.)

* * * *

The Court: Call the Petitioners' next witness.

Mr. Vance: That is the Petitioners' case, your Honor.

The Court: Does anyone wish to present any testimony?

Mr. Miller: Your Honor, we have one witness [33] we would like to present on behalf of the Alaska Transportation Company.

The Court: You may call that witness.

Mr. Miller: Mr. Davis.

GEORGE B. DAVIS,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Miller:

Q. Please state your name.

A. George B. Davis.

Q. Where do you reside?

(Testimony of George B. Davis.)

A. I live in Seattle, Washington.

Q. Where are you employed?

A. With the Alaska Transportation Company.

Q. In what capacity?

A. Personnel Manager.

Q. How long have you served in that capacity?

A. Five years.

Q. As personnel manager, what are your duties?

A. Well, the general handling of personnel and labor [34] agreements; that is one of the many duties in the over-all personnel picture.

Q. Are you responsible for crewing vessels?

A. I order the crews to my office.

Q. Is the Clovehitch operated by the Alaska Transportation Company? A. It is.

Q. Was she operated by that company in March, 1948? A. Yes, sir.

Q. Did you procure the crew for that vessel?

A. Well, the crew remained pretty much intact as it was at the previous voyage. There were possibly one or two changes, and those replacements were ordered through my office.

Q. Have you ever been aboard the Clovehitch?

A. Yes, sir.

Q. Are you familiar with the arrangement of her cabins? A. Yes, sir.

Q. And her other appointments?

A. Right.

Q. Are there any facilities for use as a sick-bay?

A. Yes, sir; there is one room for the hospital. It has four berths in it. And at any time that there

(Testimony of George B. Davis.)

is an isolated case, when we require men to be moved into other quarters than their own, the hospital is [35] available for their use.

Q. Where is that located?

A. On the after part of the main deck on the port side, inboard.

Q. It is used as a sickbay?

A. That is correct.

Q. That is its only use?

A. That is correct.

Q. Is there any governmental requirement that such a room be established aboard a vessel?

A. Depending on the operation of the vessel,—I am not too familiar with the regulations as to its requirements—but if a vessel goes beyond a certain limit it is required to have a hospital. If it stays within a certain limit, it is not required to have a hospital by law. But the vessel is licensed with a hospital and can go worldwide.

Q. Has the Clovehitch got such facilities?

A. That is correct.

Q. Mr. Davis, are you familiar with the existence or non-existence of public health hospitals in Alaskan towns and cities?

A. Well, not fully familiar with just where they are, or where they are not. There are several towns where public health is not available. [36]

Q. Is there a public health hospital in Skagway, Alaska? A. No, sir.

Q. What are these hospital slips that have been referred to here in the testimony of previous witnesses?

(Testimony of George B. Davis.)

A. I believe they are generally called a Master's Certificate for a sick or injured seaman.

Q. Are they addressed to the public health institutions?

A. That is the purpose. It is a form made out with blank lines filling in certain statistics as required.

Q. That is a public health form?

A. That is a public health form, yes, sir.

The Court: Is there any similar slip or certificate to cover a situation where a member of the crew is in need or makes a reasonable request for shore doctor examination and treatment, whether that doctor is connected with the United States Public Health Hospital or not?

The Witness: Your Honor, there is no other form, to my knowledge, unless maybe some other companies might have their own private form for purposes such as that, but our company does not have that form.

The Court: Do you know whether or not your company ever provides shore medical attention in these Alaska ports of call for men on the Alaska Transportation Company's vessels? [37]

The Witness: Yes, sir. We have done it in the past. Verification of that can be shown through our personnel records, our "T and I" records where we have paid doctor bills in the past.

The Court: Do you think that was ever done at Skagway?

The Witness: I couldn't definitely say it was ever done definitely at Skagway, your Honor.

(Testimony of George B. Davis.)

The Court: What is the attitude, if you know it, of your company respecting such medical treatment at Skagway in cases where there was any occasion for it?

The Witness: Where it is necessary for a man to have medical treatment, the instructions to the Master of the vessel are that he is to provide those medical services by private means or other means, whatever means are available.

The Court: What are the rules and regulations of your company's service as directed to pursers and other people on board the ship who may be required by your company to be responsible to your company for the carrying out of these arrangements?

The Witness: The Master is in complete charge of the vessel and in most cases instructions and a complete medical stock, sulfa drugs and penicillin and [38] all of those latest drugs are there. The Master is qualified along with his Mates by law, when they pass their examination, of a First Aid nature. What their examination is I am not too sure. But they have certain restrictions as to their knowledge of certain First Aid and medical attention.

The Master in our operation can direct the medicine chest to be put at the disposal of the men through any one of those sources. In this particular case I presume from what has transpired that Mr. Swordmaker is the one so designated.

In addition to Mr. Swordmaker being the purser

(Testimony of George B. Davis.)

on the vessel he is a graduate of the United States Sheepshead Bay Pharmacy. He is qualified as a pharmacist's mate and holds a position as such.

The Court: Did his position as purser have anything to do with his duties as pharmacist's mate?

The Witness: No. We do not require that unless he is designated to take care of the medicine chest to take care of any pharmacist duties.

In most cases it is generally practiced to use the medicine chest through the,—in most cases the Steward takes care of it in that respect.

The Court: Is there any arrangement for releasing men, merchant seamen, from their Articles [39] and terminating their services on a voyage, on which they are articulated because they become sick?

The Witness: There is no arrangement. That is pretty well governed by law and the Master's discretion. If in the Master's discretion the Master feels that the man is justified to leave the vessel and replacements are available, in such instances he will release the man.

The Court: Do you know of any company regulation or term in the contract or Articles which give the merchant seaman a right to terminate the voyage and his obligations under the contract, so far as his services are concerned?

The Witness: Under the law, to my knowledge, the contract is as written on the Articles and it does not give the seaman that privilege.

The Court: I mean in the Alaska service. Have

(Testimony of George B. Davis.)

you anything in the practice of that service which recognizes the right of a merchant seaman signing on an Alaska voyage to terminate his contract and complete that voyage as a merchant seaman if he gets a cold or gets sick?

The Witness: No, sir. There is nothing to my knowledge either in the law or in practice that makes that condition a recognized practice. [40]

Mr. Miller: May I have this marked?

(Document marked Respondent's Exhibit A-1 for identification.)

RESPONDENT'S EXHIBIT A-1

Clove Hitch

Voy. No. 12

Skagway, AAA

March 10 1948

Alaska Transportation Company

Pier 58

Seattle, Washn.

John Humes, A.B., deserting vessel at Skagway.

Gentlemen:—

At Skagway, Aaa on March 8, 1948 at about 6 pm John Humes, A-B, demanded to see a physician for treatment of a "cold" and the vessel's Purser told him to see Dr. P. I. Dahl at Skagway and at Midnight Humes returned to the vessel rather inebriated and informed the Purser that he (Humes) was "getting off the ship" and that he was flying to Seattle next day.

(Testimony of George B. Davis.)

He said that he had a written statement from Dr. Dahl recommending such a course but refused to show or read out the contents of the doctor's statement. Having had previous experience of a similar kind on another vessel with Humes, the purser suggested to Humes he go to bed and sleep over the whole thing.

The next morning at about 10 a.m. Humes told the Master of the vessel that he was quitting and requested to be paid off. He showed a slip from Dr. Dahl in which the doctor recommended "rest" for a cold to Humes. Humes retained this slip and his request was denied.

At about Noon of that day (March 9 1948) Humes took his personal belongings off the vessel with a statement to the Purser that he was flying south at 2pm of that day.

Humes at no time informed the Chief Mate of his intentions to leave the vessel at Skagway.

Mr. Geo. Hooker, the Local Agent, was informed of the above situation and he contacted ATCO home-office for instructions. He also saw Dr. Dahl regarding the matter and obtained a written statement from him, copy of which is attached to this letter.

Dr. Dahl also informed the Master that besides Humes two more of the vessel's men had visited the doctor's office with unsuccessful requests for a written statement which would permit them to leave the vessel at Skagway.

Humes was logged in the vessel's Official Log

(Testimony of George B. Davis.)

Book as a Deserter. Copy of the entry is attached.

Shipping Articles had been signed by Humes at Seattle, Washn. on February 19th 1948 effective that date. The Allotment Note signed by Humes in favor of his wife for \$100 originally due on March 18th 1948 should not be honored.

Very truly yours,

/s/ CHRIS L. ROSS,
Master.

Q. (By Mr. Miller): Mr. Davis, handing you what has been marked as Respondent's Exhibit A-1, would you state what that document is?

A. This is a letter from Captain Ross, Master of the Clovehitch, dated March 10, 1948, outlining the subject of John Humes deserting the vessel at Skagway.

Q. Is that an original document? A. It is.

Q. Was it, to your knowledge, taken from the files of the company? A. Yes, sir.

Q. Are you familiar with Captain Ross' signature? A. Yes; that is his signature.

Q. Is his signature, Captain Ross' signature, appended to Exhibit A-1? A. It is.

Mr. Miller: I would like to offer the exhibit marked as Respondent's Exhibit A-1.

Mr. Vance: We object to it, if your Honor please, as hearsay and self-serving. Furthermore, the report is made in the log and that has already [41] been received by the Court. We will object to this further hearsay report of the Captain.

(Testimony of George B. Davis.)

Mr. Miller: Your Honor, in the way of explanation, Captain Ross had to sail last night and was unable to be present here this morning. This is an original document taken from the company's files and is the best evidence we have to offer as to what the Captain would testify to had he been present.

The Court: Have you considered whether or not you had exhausted all of the proof which is available and which this witness might be able to give in response to proper questions touching the legal authentication of this document with respect to proving and establishing its admissibility in evidence any more than what you have already done?

Have you exhausted your resources on the question of admissibility so far as the proof is concerned?

Mr. Miller: I think I have exhausted it, your Honor.

The Court: I think it would be competent for somebody in the case to ask this witness how did this statement happen to be made; what was the reason for making it; whether it was customary to have such statements made and, if so, with reference to [42] the occurrence of the event which is the subject of the statement, when in the course of business would they be ordinarily made. I think it would be competent for some one in the case to ask such questions about this.

Q. (By Mr. Miller): Mr. Davis, do you know of your own personal knowledge of the reason why this document was prepared by the Captain and sent to the company?

(Testimony of George B. Davis.)

A. It was a matter to keep the home office informed of the various events that transpire on the voyage; this being an event which was of interest in the home office and of importance to the home office and the manning of the vessel, he saw fit to write this letter on March 10th. And our receiving stamp shows that we received it on either March 13th or March 15th,—I can't make out which it is.

Q. Is it customary for Captains of your vessels to write similar reports on incidents that happen during voyages which they feel are of importance to the company?

A. That is correct. At the end of each voyage the Master writes a voyage letter giving us the highlights of various incidents that transpired on those voyages.

Q. Do they also submit written reports—interim reports— [43] during the voyages?

A. On voyages, when they are not returning to the home port within a reasonable time, they send reports in to the home office when mail is available or at their convenience of mailing.

Mr. Miller: I think that is all I have, your Honor.

The Court: Is there any regulation or requirement of the company respecting such a report as this?

The Witness: We require the Master to make a voyage report. Sometimes in the course of a long voyage the reports come through over a period of time as and when incidents transpire. The main

(Testimony of George B. Davis.)

course of the voyage and the main voyage is left until the end of the voyage regardless of how long.

But in most instances in the Alaska trade, the voyage does not exceed over a month, that letter is written—unless something of this nature comes up that is of importance to the home office—then the Captain will either wire or report to us by mail.

The Court: Is this report or letter in response to the requirements of your company as mentioned?

The Witness: Yes. It falls within the lines of keeping the home office informed of incidents as [44] to crew situations and any other incidents of that type that we like to be informed of when they happen.

The Court: When was this response, Exhibit A-1, made or when was it filed with reference to the time of the occurrence of the events therein mentioned?

The Witness: This letter was written on March 10th. The incident according to this letter was after March 8th.

The Court: Which does this letter relate to?

The Witness: To Humes.

The Court: Does it concern the petitioner, McKanna?

The Witness: No.

At that time the petitioner, McKanna, had not left the vessel yet.

The Court: With reference to the occurrence of events relating to Mr. Humes, when was this exhibit mailed by the Master?

(Testimony of George B. Davis.)

The Witness: This letter was dated March 10th in Skagway, Alaska, and received in our office in Seattle,—our receiving stamp, I think it shows March 13th. It could be March 15th.

The Court: Was your company's Seattle office's receipt of that communication in the ordinary course of [45] the mail or other means of communication?

The Witness: This was received,—I believe it was sent Air Mail. If it was received on the 13th, it would undoubtedly have had to have been mailed Air Mail.

The Court: Is that a usual method of transmitting messages from Alaska to the Seattle office of your company?

The Witness: It has since Air Mail has come to the point where it is almost 100 per cent dependable. By vessel in ordinary mail it is possible not to receive a communication within ten days.

The Court: Was that, Respondent's Exhibit A-1, required or was it not required by any standing regulation or requirement made by your company of its ship masters?

The Witness: Yes.

The Court: Is there any other question anyone wishes to ask?

Mr. Miller: I don't think so.

The Court: Does anyone have any question to ask touching the admissibility of this Exhibit A-1?

Mr. Vance: No questions.

(Testimony of George B. Davis.)

The Court: I believe that the admissibility has been reasonably established by the proof. [46]

Mr. Vance: If the Court please, it seems to me from little I read of the letter that not only is it hearsay and a self-serving document on the part of the respondent, but in addition to that it is based upon further hearsay. It is hearsay built upon hearsay. It contains reports of other persons, the purser and so forth.

Furthermore, the rendering of this report was discretionary with the Captain—whether he should write then or some time later or make some other kind of report as far as the company's own regulations are concerned.

I do not think it is such a thing as an entry made in the usual and ordinary course of business, such as a minute entry or a financial transaction or some statement such as that.

This is completely hearsay, self-serving, and a narrative of an incident which is the very issue of the litigation here. Not only is it **self-serving hearsay** on the part of the Captain but it contains other self-serving and hearsay evidence of other persons aboard the vessel and other persons concerned, which evidence we have no opportunity whatsoever to rebut or cross-examine.

The Court: Is it possible for a ship's master [47] to in the ordinary course of business make a report on the occurrences aboard ship if he is required to, and is it possible then if he does that such report becomes a part of the ordinary files

(Testimony of George B. Davis.)

and records of the company, made in the ordinary course of business?

Mr. Vance: Yes, your Honor.

He makes it in a log and that log is before your Honor.

He is required by statute to make a complete and full report of all incidents of an unusual nature.

The Court: I guess there is no question about the log. But would the fact that this is a log keep the company from having other correspondence in the ordinary course of business at the home office or a foreign agency?

Mr. Vance: Such a mere entry, of course, in the course of business, a report that a man left the ship might be such an entry but a complete narrative, I do not believe it constitutes such an entry—a complete narrative concerning the entire transaction. If this company were attempting to prove dates or such as that by reports or entries made in the course of business, then I deem that those would be competent here to establish such matters as that. But this is a complete narrative which is not such an entry concerning [48] the whole subject matter.

Mr. Geisness: As I understand the rule as to the admissibility of documents made in the ordinary course of business, the rule is qualified by the proposition that they must have been made under circumstances that would not suggest an intention to change the facts in favor of the person who made the entry or the report.

(Testimony of George B. Davis.)

Therefore, if the report is made by a party in interest in the transaction and he has such an interest that it might color his report, as I understand the rule that report would not be admissible as an entry made in the regular course of business because a necessary basis for the application of that rule is that the person that made the entry must not have been under such circumstances in such a position that he might have his entry colored by his own interests.

The Court: Suppose the Union to which a merchant seaman belongs, and suppose further that a merchant seaman becomes a member of the crew in pursuance of the contract between the Union and the ship, and suppose that the Union requires the merchant seaman member of a Union in instances like this of the voluntary quitting of the ship by the merchant seaman [49] to make a report of the circumstances to the Union — not to the steamship operator — of the circumstances surrounding it, and that it is without reference to any litigation pending or which may hereafter be instituted but merely for the records and business information of the Union, then suppose there was a dispute later between the Union or one of its members, the man who voluntarily left the ship on the one side and steamship operator on the other; suppose that report contains some information material to the issue in court, do you feel clear that the merchant seaman or the Union would not be entitled to have the court given the benefit of that information on the theory that the information is

(Testimony of George B. Davis.)

contained in the business report made at the time in the ordinary course of business and without reference to litigation?

Mr. Geisness: If the report were made by the person who left the ship, it would appear to me that he undoubtedly would have an interest at the time he made the report in defending his position of leaving the ship. Therefore, as I understand the report would be disqualified and would be inadmissible. If some other person made the report, making it without interest, and simply as a routine report of the [50] fact in the ordinary course of business, then it would be admissible as I understand the rule. I don't mean that I have briefed it recently but I have briefed it and I understood that was a definite qualification of the rule.

The Court: Is it not the rule in law, as to admissibility of evidence, that where a business concern requires of its employees to make to it in the course of their employment any report or any record in the ordinary course of the employee's performance of company duties, and if the company does in the ordinary course of its business rely upon that report, act upon it and keep it as a part of its business records, may not that report as a thing done—not as a statement made—but as a thing done in the ordinary business of the company become admissible on any issues thereafter pertaining to the event?

Mr. Geisness: I think not entirely. I think a good illustration is the routine reports of accidents

(Testimony of George B. Davis.)

made by conductors on street cars and the engineers on railroads that there is an established custom that a report made to the City or other operator of the utility is admissible; and if the motorman made a report that the accident happened [51] due in substance to the negligence of another vehicle or due to the negligence of the injured person, I think without the slightest doubt that that report although one required in the ordinary operation of the utility and one perhaps relied upon by the utility in dealing with the case would be inadmissible on behalf of the utility if it were sued.

The Court: You take, for instance, a bank employee's reports or memorandum on a credit application or on any banking transaction, if the customer gets into a dispute with somebody else or if the bank gets into dispute with somebody else concerning the bank's conduct in reference to the account, is it not true that any memoranda made by a banking employee or official, made in the ordinary course of his business and duty and authority, respecting that account or the occurrence in question connected with the account—is that not admissible thereafter in any dispute between the parties?

Mr. Geisness: Always subject to the condition that the person who made the report or the memorandum was so situated at the time he made the memorandum that it would not be presumed that he was biased by reason of his interest and, of

(Testimony of George B. Davis.)

course, in ordinary [52] mercantile and banking transactions, the person making the report has no possible interest that could not be out-weighed and is not out-weighed by his duties and responsibilities as an employee to accurately report what happened. I know that is a fact that is taken into consideration. It depends always upon the nature of the transaction.

For example, if the banking or employer official in question had already fallen into difficulty with the customer and it was quite apparent on the face of the transaction that the employee or officer might be called upon to defend himself as against the customer and defend his course of conduct, then, after that arose he made this report that is usually made, I think that would not be admissible.

The Court: I have no doubt of that. But if it were made at the time the event occurred, by reason of some company requirement or if whatever he did was actually in the ordinary course of his business duty, then I ask you why the ordinary rule admitting a business record as a part of the record made in the ordinary course would not apply.

Mr. Geisness: That rule would apply unless we assume—I assume that the Captain would be interested in supporting the purser's conduct and condemning [53] the conduct of the man that left the ship.

The Court: If there was anything in the act done which was favorable to the particular em-

(Testimony of George B. Davis.)

ployee doing it, then that would exclude it. Is that not carrying the exception too far?

Mr. Geisness: I think it would be carrying it too far to carry it to the point that anything favorable to the employee was excluded.

I think the test is whether on the face of the whole transaction, taking into consideration the employee's status and his responsibility as an employee, whether it might be calculated or expected that his interest in the immediate transaction would color his report.

The Court: Mr. Miller, you having proposed the exhibit for admission, do you wish the court to have the benefit of any authority which you had when you decided to offer it or bring it here for that purpose?

Mr. Miller: Your Honor, I have no authority and have not briefed the point. However, it apparently is a document that was written as the result of a normal practice by the Captain. It was written the day after the occurrence—actually, the day after the man took off from the ship, I believe, and [54] prior to the time or period there was known to be any controversy. I have not briefed the matter, your Honor, and cannot cite any authorities. In my opinion, it should be admitted in the case.

The Court: This is a situation like those which frequently arise in the course of trials. The Court, without the benefit of any authority, is of the opinion that this is admissible but I am not going

(Testimony of George B. Davis.)

to take the chance of committing error on the question by admitting it.

The Court for the time being at least will reserve ruling on it and I will see if anything further happens in the course of the trial that bears upon the admissibility of this document.

I am inclined to the view that it is admissible but I recognize the great force—not only in the argument of counsel offering it but also in the argument of counsel opposing it.

It would be extremely helpful if both sides had presented the court with authority supporting their views and particularly it could be expected that the one offering it should be armed with some authority for his position. It is possible the other side, of course, wouldn't anticipate the offer of the document, not knowing of its existence. [55]

However, it will stand as a document marked for identification and I will see further if there is any further proof touching it.

Mr. Miller: Your Honor, in the way of explanation, we did not know when this hearing was taking place until very late. I did not have an opportunity even to examine the files until this morning.

The Court: You may proceed.

Q. (By Mr. Miller): Mr. Davis, it has been testified to by Mr. McKanna that the purser on board the vessel, a man by the name of Sword-maker, left the vessel at Skagway.

Would you state the reason for his leaving the vessel?

(Testimony of George B. Davis.)

A. Mr. Swordmaker was under instructions from the home office at the time the vessel was completely loaded and prior to its leaving the Port of Skagway for the next destination in the Port of Houston, Texas, he was to remain in Skagway, assist the agent with the paper work involved on this particular cargo, and after that was completed he was to return to Seattle. He left the vessel under company instructions because, in the course of the voyage from Skagway to [56] Houston and return, the services of a purser were not necessary.

Q. Do ship's officers have to acquire certain knowledge of medical practice in order to pass their licenses?

A. Licensed deck officers have to have a certain amount of knowledge. What it consists of, I am not sure. But to get their license they do, as they go up through the grade from Third Officer to Master, they are required by law to know certain parts of First Aid and such minor things as that.

Q. Is there requirement on board vessels engaged in the Alaska trade that the medical supplies and medical chest be carried aboard the vessel?

A. That is a requirement on any vessel, regardless of what trade it is.

Q. That is a requirement by the United States Coast Guard?

A. That I couldn't say, just what the government requires.

(Testimony of George B. Davis.)

Q. Is it required by some governmental regulation or law?

A. That controls the operation of vessels. It is under one of those and I presume under the Coast Guard.

The Court: I believe the material inquiry in that connection is what was the fact in reference to this vessel at the time these two men met the [57] ship.

Mr. Miller: That, your Honor, I can't ask because this witness was not there and does not know.

The Court: Somebody might properly inquire of this witness or some other one as to whether or not that medicine chest provision was a condition to certification of the vessel for the voyage.

Q. (By Mr. Miller): Mr. Davis, do you know whether or not the presence and certification of the medical chest aboard this vessel was required before any certification on this voyage?

A. I was on board the vessel upon its return Thursday afternoon. And in the Master's office there was quite a sizable cabinet full of medicines. As to what all they were or to what the volume of those medicines were, I could not say, but it looked like an ample supply of various types of medicines for a voyage of long duration. What had been used in the course of the voyage I do not know.

Q. You do not know of your own knowledge

(Testimony of George B. Davis.)

what was aboard when she left or whether any inspection was made? A. No.

Mr. Miller: That is all, your Honor. [58]

Cross Examination

By Mr. Vance:

Q. Mr. Davis, you have stated, I believe, that the Masters of your company are instructed to provide medical assistance to the seamen, when necessary, at any port?

A. That is correct. They have been advised of these and they are well aware of the various conditions that arise. And they have general instructions in regards to those matters.

Q. In other words, whether there is general public health service or not? A. Yes.

Q. Mr. Davis, you stated that the services of the purser were not to be necessary after leaving Skagway? A. That is correct.

Q. The ship was going from Skagway to Houston, Texas direct non-stop, is that correct?

A. That is correct.

Q. Would there be any pharmacist's mate aboard? A. Not required by law.

Q. As a matter of fact, in regard to this crew, was there any other pharmacist's mate aboard?

A. None licensed as such but the deck officers are qualified [59] in that respect.

Q. According to the first aid instructions they have had, that is? A. Yes.

Q. Were there any other personnel that were

(Testimony of George B. Davis.)

not necessary, after leaving Skagway, bound for Houston?

A. You are required by law to carry certain drugs. The only one who was to give them out was the purser.

Q. Were there any others whose services were not necessary by virtue of any contract or otherwise?

A. If I follow what you are referring to, it is: does the law or does the law not require you to carry winch drivers.

Q. Does the law require you to carry winch drivers to Alaska?

A. Our Union contract requires us to carry winch drivers.

Q. Would that contract have required you to carry winch drivers between Skagway and San Antonio, Texas? A. No.

Q. When you saw the ship here—that was last Thursday when it docked in Seattle.

A. I went aboard Thursday. Now, I think it got in the day before, if I recall.

Q. Anyway, it was about day before yesterday that you were aboard the ship? [60]

A. Thursday afternoon.

Q. And it had an ample supply of medicines at that time, you say, or what appeared to be an ample supply for a long trip?

A. To a layman, yes.

Q. So you assume that that situation prevailed all through Alaska, is that correct?

(Testimony of George B. Davis.)

A. To my knowledge I don't know of any purchase of medicines other than what was placed aboard the vessel prior to sailing.

Q. There would have been no reason in Alaska for not dispensing medicines freely from the medicine chest, would there? A. There would not.

Q. Were there any replacements available to be put aboard ship?

A. No, there were no replacements available in Skagway.

Q. He left the ship four or five days before the ship sailed in Skagway, did he not?

A. I believe so.

Q. He flew to Seattle that day, did he not?

A. That is correct.

Q. Were any requests made to replace Humes in Alaska?

A. We were notified of his leaving the vessel but no direct request was made to replace the man.

Q. And the ship sailed to San Antonio, Texas without these two men without replacements having been made for them?

A. That is correct. She was still manned within the law.

Q. And was she manned so that it could be operated properly?

A. In the operation and the run after leaving Skagway, she was manned sufficiently to take care of her needs, yes.

Mr. Vance: That is all.

(Testimony of George B. Davis.)

Redirect Examination

By Mr. Miller:

Q. Mr. Davis, you referred to a Union contract requirement as to winch drivers for the Clovehitch.

Explain what you meant by that reference, will you please?

A. By law the vessel is required to carry six AB's, three ordinary seaman—that have a certificate by law, I presume—I believe, on this particular type of vessel. By Union contract we carry in the Alaska trade nine AB's, two winch drivers, and a boatswain. The three changes of ratings between ordinary [62] and AB have been negotiated through the Union and have been changed in that particular grade to two AB's—that is the reason for nine instead of six. The winch drivers have been negotiated because in the Alaska operation historically sailors have discharged and loaded the cargo. At one time winch drivers were not available.

In various ports in Alaska that particular skill is not available even today. So it is necessary to carry this type of rating on the Alaska vessels if the cargo was to be loaded or discharged.

In most cases the winch drivers are able-bodied seamen. In this particular case — going into the Union contract situation—prior to the vessel's sailing I endeavored to negotiate with the Union to the extent that we were not endeavoring to reduce the manning by the winch drivers in Skagway after the function of the trip was completed.

(Testimony of George B. Davis.)

We requested the Union to put a rider onto the Articles whereby these men would retain the rating of winch driver and the pay of winch driver, but would perform certain duties which would normally be performed in daytime without the payment of overtime under the unwritten contract that the winch drivers get overtime in the Alaska trade.

This was refused by the Union and we signed on the ship with the usual ratings for the duration of the trip to Skagway, Alaska and the Gulf and return to Seattle.

Q. Mr. Davis, you stated that the crew worked cargo from Alaska points?

A. I think they worked one-half in all of the ports.

Q. Is that usual in trades intercoastal other than Alaska? A. No, sir.

Q. Do the crews secure additional pay for working cargo?

A. They get overtime at a specified rate per hour.

Q. That is in excess of their base pay as seamen? A. That is correct.

Q. After leaving Skagway, where did this vessel next touch shore?

A. Her next port of call was Houston, Texas.

Q. Did the crew work any cargo there?

A. No, sir.

Q. They would not have received any overtime for that purpose at Houston, Texas?

A. Other than ship's overtime which would fall

(Testimony of George B. Davis.)

within the Union contract. There would be no more cargo operations.

Mr. Miller: That is all. [64]

The Court: Have you any way of knowing whether the petitioners Humes and McKanna knew that when that vessel left Skagway and sailed, her next port of call would be Houston, Texas?

The Witness: I believe every member of the crew knew that the ship was sailing to Houston, Texas.

There was a doubt as to whether it would make two ports of call in Texas or not, but I think it was generally known all over the waterfront and also aboard the vessel that the ship would call at Houston and possibly report into another port in addition.

The Court: You may inquire.

Mr. Miller: No further questions.

Mr. Vance: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Miller: Your Honor, we have no further witnesses. We were unable to secure the Captain, Captain Ross, or the purser, Swordmaker, here. It will be gone approximately one month.

The Court: Very well.

(Argument presented by respective counsel for the petitioner and respondent.) [65]

Seattle, Washington
May 15, 1948, 10:00 a.m.

COURT'S DECISION

The Court: I do not think either of these petitioners, Mr. Humes or Mr. McKanna, has sustained the burden of their allegations in their petitions. On the other hand, I believe the shipowner or operator has sustained any burden cast upon it respecting the issues framed as to whether or not these men left this ship justifiably or unjustifiably, and further as to whether or not they were specifically guilty of desertion of the ship.

So far as I know, or has here been shown, Articles calling for service by the crew for this voyage remaining uncompleted at Skagway were then still binding upon both parties to the Articles—the members of the crew on the one hand and the operators or owners of the ship on the other. Both parties are bound according to the terms stated in the contract. Neither is entitled to terminate the contract without just cause. That applies to both sides. These two men, in my opinion, [66] got scared by health conditions up there and I think they were not justified in getting scared. I think after they got these colds each of these two men decided that he didn't want to pursue the remainder of this voyage and he was willing to suffer the consequences of wrongful termination by him of his part of the contract in order for him to escape the performance by him of the remainder of his contract for that part of this voyage from

Skagway to Texas ports. These men did not turn out to have any serious health conditions that could not have been properly treated and dealt with if they had remained on board the Clovehitch, where they were supposed to serve pursuant to their Articles. The Court does not believe that the ship was not provided with sufficient medicine kit to take care of any ordinary cold conditions.

The conduct of these two petitioners, Mr. Humes and Mr. McKanna, during the next two to five days after they left the Clovehitch at Skagway, does not justify the contention of either one of them that the facilities on board the Clovehitch for treating their colds were inadequate. Mr. Humes took an airplane to Seattle. He did not call upon a doctor immediately upon coming to Seattle nor go to a hospital in Seattle. He went home and went to bed, and stayed there from Thursday until [67] Monday, and then he went to see a doctor. He could have done the same thing on board the Clovehitch. He could have stayed in his bunk or he could have gone to sick bay. There isn't any question in my mind on the proof here that there was an adequate ship's bay provided on the vessel.

So far as the Petitioner McKanna is concerned, he went on board the Princess Nora as a passenger and he went to his room where he stayed for about three days while the vessel was proceeding to its destination in Vancouver, B. C., and that he got some medicine from the stewardess during that voyage. He did not do anything more in the treatment of his cold for virus X or whatever it was

he had than he could have conveniently done if he had stayed on board the Clove Hitch. However, I will say this, in mitigation of their attitude and their conduct, that probably each one of them did get scared about this virus X although their attitude was not justified in fact. In view of that mitigation, it is the finding, conclusion and decision of the Court that although both of these men were logged as deserters when they left their ship the Clovehitch and repudiated their Articles to serve on that ship for the remainder of the voyage she was then on, they should not be required to forfeit all of their unpaid wages but only a [68] part of their wages. And the Court decides that each shall as a penalty for such desertion forfeit \$200 of his unpaid wages and that the balance, after deducting from the unpaid amount that \$200 forfeit shall be paid to each of these men from the amount of wages now in the registry of this Court. Stated another way, each shall forfeit \$200 of the unpaid wages which are on desposit for his account in the registry of this Court. In the case of Humes, after such deduction, the remainder of \$153.86 shall be paid to him. As to the Petitioner McKanna, after such reduction, \$183.81 shall be paid to him.

Is there anything not covered as to these two cases?

Mr. Egger: The clerk has some statutory fees which amount to 75 cents or \$1.00 each. Do I understand that the money shall be returned less those statutory fees?

The Court: Do you advise that the Court has

no authority in law to order that those clerk's fees be not deducted from the remainder in each case?

Mr. Egger: No, I do not advise that.

The Court: It is the Court's preference not to provide that the Clerk shall have any of these fees on this occasion; and that unless you later advise that [69] the law prohibits the Court from so ordering, the order of the Court will be that no fees be paid to or collected by the Clerk on account of this proceeding as to each of these petitioners.

(Concluded) [70]

CERTIFICATE

I, Merritt G. Dyer, Official Court Reporter for the United States District Court for the Western District of Washington, Northern Division, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had as to the application of John E. Humes, alleged deserting seaman, for withdrawal of wages, Case Number 48-12 (1) In Admiralty Court.

/s/ MERRITT G. DYER,
Official Court Reporter.

[Endorsed]: Filed Sept. 3, 1948. [70-A]

[Endorsed]: No. 12038. United States Court of Appeals for the Ninth Circuit. John E. Humes, Appellant, vs. Alaska Transportation Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed September 14, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

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In the United States Court of Appeals
for the Ninth Circuit

No. 12038

JOHN E. HUMES,

Appellant,

vs.

ALASKA TRANSPORTATION COMPANY,
Respondent.

STATEMENT OF POINTS RELIED UPON
AND DESIGNATION OF RECORD

The appellant herein hereby adopts his assignments of error heretofore filed herein as his statement of the points on which he intends to rely on this appeal.

The appellant designates the entire record as necessary for the consideration of the appeal.

/s/ BASSETT & GEISNESS.

/s/ J. DUANE VANCE,
Proctors for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed September 22, 1948. Paul P. O'Brien, Clerk.

No. 12038

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN E. HUMES,

Appellant,

vs.

ALASKA TRANSPORTATION COMPANY, a corporation,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

FILED

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PAUL P. O'BRIEN,

CLERK

BASSETT & GEISNESS,

Proctors for Appellant.

811 New World Life Building,
Seattle 4, Washington.



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**IN THE
UNITED STATES
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<hr/> JOHN E. HUMES,	<i>Appellant,</i>	}	No. 12038
vs.			
ALASKA TRANSPORTATION COMPANY, a corporation,	<i>Appellee.</i>		

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

The appellant herein was a seaman aboard the M.S. CLOVE HITCH, when on March 9, 1948, he left the vessel at Skagway, Alaska, under circumstances hereinafter described. The captain of the vessel logged him as a deserter and thereafter on May 14, 1948, the United States Shipping Commissioner paid the wages due him into the United States District Court for the Western District of Washington, Northern Division, together with a document known as Account of Wages of Deserting Seaman. Appellant appeared in the District Court and demanded the payment of said wages to him.

Primary jurisdiction of the District Court is granted by the provisions of Section 41, Title 28, U.S. C.A., vesting jurisdiction of all admiralty causes in Federal District Court. More specifically, this particular proceeding is governed by several sections of Title 46, U.S.C.A., which follow:

Title 46, Section 701 U.S.C.A., provides:

“Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

“‘First, for desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned. * * *’”

Title 46, Section 706 U.S.C.A., provides that all such wages which are forfeited for desertion

“shall be applied in the first instance in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place, and the balance, if any, shall be paid by the master or owner to any Shipping Commissioner resident at the port at which the voyage of such vessels terminate; and the Shipping Commissioner shall account for and pay over such balance to the Judge of the District Court within one month after the Commissioner receives the same, to be disposed of by him in the same manner as is prescribed for the disposal of the money, effects and wages of decedent seamen
* * *

Title 46, Sections 626, 627 and 628 U.S.C.A., with reference to deceased seamen’s wages and effects provide that the same shall be paid by the Shipping Com-

missioner to the District Court and the District Court shall determine the claimants thereto and distribute the balance to the Treasury of the United States to a fund appropriated to the relief of sick, disabled and destitute seamen belonging to the United States Merchant Marine Service.

The Jurisdiction of the Circuit Court of Appeals

The jurisdiction of this court is granted by the provisions of Section 225, Title 28 U.S.C.A., which give the Circuit Courts of Appeals jurisdiction of all appeals from final decrees of District Courts. This section has been, in substance, re-enacted in the new codification of the judicial code effective September 1, 1948, Title 28, Section 1291 U.S.C.A.

STATEMENT OF THE CASE

The procedure by which this cause was heard appears somewhat confused in the record, so for clarification some of the facts concerning it are here set forth.

The petitioner herein, John E. Humes, was alleged to have deserted the M.S. "CLOVE HITCH" at Skagway, Alaska, on March 9, 1948. On May 13, 1948, the "CLOVE HITCH" arrived at Seattle, Washington, and paid off (Ap. 21). At that time the petitioner was at the ship and protested (Ap. 21). The Shipping Commissioner thereupon set a hearing at his office for the following day, May 14, 1948, at noon (Ap. 22). No representatives of the company appeared at that hearing (Ap. 22). The account of wages was filed in District Court by the Commissioner that same day,

May 14, 1948, and the court thereupon set the following morning, May 15, 1948, for the hearing (Ap. 24). In the meantime some matters apparently transpired which are not of record, for at one o'clock on May 14, 1948, counsel for petitioner were advised that a hearing was scheduled on this matter for 1:30 of that day. Counsel for petitioner learned and informed the court that the reason the hearing had been moved up to that afternoon was that the "CLOVE HITCH," then being in Seattle, was sailing at 5:00 o'clock that afternoon (Ap. 17) and it was felt that the steamship company might have desired to have the captain of the ship testify (Ap. 29). The petitioner could have testified the following day (Ap. 29), as he was then serving aboard the "RAIN SPLICE" which was not due to sail from Seattle for six days (Ap. 28). The trial court apparently misunderstood in assuming and stating that the hearing was expedited for the benefit of petitioner (Ap. 24). At the conclusion of the afternoon hearing the matter was continued until the following morning at which time it was concluded.

At the hearing the evidence showed the following state of facts. The petitioner, John E. Humes, has been a seaman for sixteen years (Ap. 32). Prior to March 9, 1948, he had been serving aboard the "CLOVE HITCH" for approximately thirteen and one-half months and had made about fifteen round trips between Alaska and Seattle (Ap. 32).

On or about March 9, 1948, the vessel was at Skagway, Alaska (Ap. 2). At that time there was an epidemic of virus flu in the community (Ap. 19)

from which about seventy-five per cent of the town was suffering (Ap. 26). The petitioner was a winch driver required to work on open deck (Ap. 25). The vessel had been in Skagway for approximately two weeks prior to March 9 (Ap. 25) during all of which time petitioner had performed his duties.

Petitioner got the flu "or something" and twice asked the purser for a hospital slip (Ap. 25, 26). The purser refused (Ap. 25). The petitioner then asked the captain about a hospital slip and was referred back to the purser (Ap. 26).

The petitioner then went to Doctor Dahl, the Skagway Railway doctor, who gave him some sulpha pills (Ap. 26) and a letter that petitioner had been in there and probably had the virus flu, which required bed rest (Petitioner's Ex. 1, Ap. 35).

Petitioner then demanded wages from the captain, which were refused (Ap. 27). The following day (March 9, 1948) petitioner took his gear, left the vessel and flew to Seattle, arriving on Thursday. He went to bed where he stayed until Monday morning (Ap. 40). On Monday morning, March 15, 1948, he presented himself to Dr. R. E. Seth, M.D., who diagnosed his condition as Virus X and gave him penicillin and diathermy treatments on March 15, 17 and 19, 1948 (Petitioner's Ex. 2, Ap. 36). For these services the doctor charged petitioner \$14.00 (Petitioner's Ex. 4, Ap. 37).

The captain of the vessel logged petitioner as a deserter (Ap. 18, 19). A representative of the company secured a second statement from Doctor Dahl

(Ap. 50) in which he stated that *the petitioner had no temperature at the time he called*, but that there was an epidemic of virus flu and *he had suggested that the petitioner go to bed and stay there until such time as his temperature was normal.* (Sed quaere.) The doctor went on to state that he realized he was "taken in" by petitioner and that petitioner's breath had had a liquor odor (Ap. 19). This letter was entered in the log (Ap. 19).

The vessel was due to go non-stop to Texas from Skagway and the purser, who was also the pharmacist's mate, was under instructions to leave the vessel at Skagway (Ap. 64).

The company is required by union contract to carry winch drivers to Alaska but not to Texas. Although no replacement was secured for petitioner when the vessel left Skagway bound for Texas she was manned within the law and in such a manner that she could be operated properly (Ap. 68).

The court rendered it's oral decision (Ap. 3, 4, 5, 6, and Ap. 72, 73, 74, 75, and, pursuant thereto, entered it's order adjudging petitioner guilty of desertion and ordering \$200.00 of his pay forfeited (Ap. 7, 8). Petitioner appeals to this Court from that order.

SPECIFICATION OF ERRORS

The appellant specifies as errors the following:

- (1) The District Court erred in holding that the petitioner was guilty of desertion;
- (2) The District Court erred in holding that the petitioner left his ship without justification;
- (3) The District Court erred in assessing an excessive penalty under the circumstances.

All the above specifications of error are to be found in the Appellant's assignment of errors at page 10 of the Apostles.

ARGUMENT

I.

The District Court erred in holding that the petitioner was guilty of desertion and in holding that he left his ship without justification (Specification of Errors 1 and 2).

Desertion by a seaman consists in the abandonment of duty by quitting the ship before the termination of his engagement without justification and with the intention of not returning. See *The City of Norwich*, 279 Fed. 687, 698; *In re Williams* (4 C. C.A.) 139 F.(2d) 262. Petitioner herein contends that he was justified in leaving the vessel.

In *Gifford v. Kollock*, Fed. Case No. 5409, 3 Ware 45, a father apprenticed his son aboard a whaling vessel for a long voyage. During the time it was out, the son drew certain sums by way of advancements from the captain. Amongst these was an item of \$300.00 for clothing, which the court found unjust-

tified and not necessary. The vessel reached Australia and was from there bound for home. The son who had during the voyage become of age, in fear of his father because of these advances, left the vessel. The court refused to forfeit the seaman's wages for desertion saying at page 343:

"The law looks with indulgence on the faults of seamen when they are free from malignity and arise from thoughtlessness, improvidence and that want of consideration which is so characteristic of them as a class. In such cases it inflicts its penalties with gentleness and reluctance; and in so doing it will look to the conduct of the officers toward the men, as well as making some allowance for the habitual improvidence of the men. And this it will especially do when such conduct may in any way have tended to produce the fault which it is sought to punish."

The claims of seamen for their wages have always been favored by courts of admiralty. In *The City of Norwich*, 279 Fed. 687, 695, the court said:

"The libelant seeks recovery of wages and the claims of seamen for wages are highly favored by the court. See *Idle Hour*, C.C.A. 63 Fed. 1018."

In forfeiting the wages of a seaman for desertion the burden of proof is on the ship owner to establish the desertion. In *re Williams* (C.C.A.) 139 F.(2d) 262; *The City of Norwich*, 279 Fed. 687, 698.

Desertion of a vessel by a seaman is and always has been regarded as a highly serious offense and is not to be lightly treated nor is he to be convicted thereof unless it is clearly shown. In *The City of Norwich*, *op. cit.*, the court said at page 699:

“The desertion of a ship by seamen has always been regarded by the maritime law as a very serious misconduct. A Hanseatic ordinance of 1380 made it a crime punishable by death and a later ordinance of 1591 made it punishable by branding, and various early ordinances made it punishable by imprisonment. And even under Article 221 of the Merchant Shipping Act of Great Britain of 1894 a seaman on a British ship who deserts is still liable under some circumstances, to imprisonment.”

Because of these considerations and many others the courts have been extremely liberal in their interpretation of what constitutes justification for leaving a vessel. In *The Mt. Everest*, 17 F.(2d) 478, the Circuit Court of Appeals held that the exaction of 10 hours work per day when the articles called for only 8 hours justified the seamen in leaving the vessel and that as a result they were not guilty of desertion.

The District Court of Washington held in *The Forteriot*, 98 Fed. 440, that a seaman was justified in leaving a vessel having insufficient food and was not a deserter for so leaving.

The courts have always held that mariners had the right to leave a vessel on which they were ill-treated. For example in *Coffin v. Weld*, Fed. Cas. No. 2953, 2 Lowell 81,. the court said:

“Mariners have a right to leave a vessel on which they are constantly and persistently ill-treated; and by the general maritime law such conduct is not desertion; and they may recover full wages notwithstanding.”

See also *Bush v. The Alonzo*, Fed. Cas. No. 2223, 2 Cliff. 548.

Similarly it has been held that a seaman's wages will not be forfeited where his actions were based upon a mistake as to his rights. *Magee v. Ross*, Fed. Cas. No. 8944. In that case the charter called for a trip to a South American port or others. The captain wanted to make a trip to Marseilles, France, under these articles. The seamen believed that they were not obliged to make such a trip under those articles and left the vessel. The court held that the articles were sufficiently broad and that they were under those articles obliged to make the trip to Marseilles, France, but nevertheless refused to forfeit their wages on the grounds of desertion, saying at page 388, 389:

"The libelants left the ship under a belief that they had a right to do so; that the intention to take them to Europe was a breach of the contract, and discharged them from it. They also thought that the treatment they had received from the captain dissolved their contract. They were mistaken on both points; it was a mistake of law of their case, and not a mutinous resolution to disregard their contract, and the law which bound them to it. Their conduct shows that they had a sincere confidence in their opinion and were willing to bring it to a fair test."

A case very similar to that at bar is *In re Williams* (C.C.A. 4, 1943) 139 F.(2d) 1262. In that case the seaman was suffering from a chronic illness for which he was ridiculed by the master and the other seamen and they accused him of loafing and faking illness.

He went ashore for treatment and refused to return to the ship. He also demanded half his pay which the captain refused and thereafter the seaman refused to rejoin the vessel. He was logged as a deserter and the District Court held him guilty of desertion and only allowed him half of his wages. The Circuit Court of Appeals reversed and allowed the seaman the total of his wages.

In *Scott v. Rose*, Fed. Cas. 12, 545, it was held that a seaman who left the vessel because of illness of his wife was not guilty of desertion. The court said his absence under such circumstances was "not in any sense a desertion by the maritime law."

Under the principles enunciated and set forth by the admiralty courts in the cases cited, it seems clear that under the facts in this case the petitioner should not be held guilty of desertion. Compare, for example, the conduct of the captain in *Gifford v. Hollock*, Fed. Cas. No. 5409, with the conduct of the captain in this case. In that case the court felt that the captain tended to produce the fault which it was sought to punish in that he over-indulged the seaman's request for withdrawals which placed the seaman in the difficulty, for which he felt leaving the vessel was the only remedy. In the case at bar the captain and the purser refused to send the petitioner ashore for medical assistance (Ap. 26). The captain did this in spite of the fact that his instructions from his own company were that "where it is necessary for a man to have medical treatment the instructions to the master of the vessel are that he is to provide those medical

services by private means or other means, whatever means are available." (Ap. 47)

Consider also the circumstances under which that refusal was made. A goodly portion of the town of Skagway was suffering from an epidemic which was called "virus flu." (Ap. 19) Petitioner became ill with similar symptoms. His work required him to be on deck and work in the cold wind (Ap. 25). When the ship left Skagway bound for Texas it would have aboard no pharmacist mate (Ap. 64) and, of course, the attentions and services of a physician, if needed, during that voyage would be unavailable.

The trial court assumed that this was nothing more than an ordinary cold. See, for example, the comment of the court in his decision (Ap. 73):

"The court does not believe that the ship was not provided with sufficient medicine kits to take care of any *ordinary cold condition*."

See also the examination of the Petitioner Humes by the court (Ap. 41). The doctor in Seattle referred to the illness as "virus X" (Pet. Ex. 2, Ap. 36) rather than as "virus flu" (Pet. Ex.1, Ap. 35) as did the doctor in Skagway. The trial court may be properly advised that "virus X" or "virus flu" are synonymous with "ordinary cold." If such is the case it does not appear of record nor is counsel so informed. In any event, the situation should be considered in the light of the belief of petitioner at the time. At that time the doctor in Skagway referred to it as "an epidemic of virus flu" and it is respectfully submitted that the petitioner was not chargeable with such knowledge

as the trial court may possess regarding the etiology of "virus flu."

That the petitioner left the ship for the sole reason of his fear of this disease is quite evident from the record. Petitioner has been a seaman for sixteen years (Ap. 32). Prior to the date of leaving the vessel he had been serving aboard this particular ship for approximately 13½ months and had made about fifteen round trips between Alaska and Seattle (Ap. 32). What change, if any, occurred other than petitioner's illness? None is shown by the record.

The petitioner, of course, was genuinely ill for he sought the services of a physician upon his return to Seattle where he was given penicillin and diathermy treatments at his own expense (Petitioner's Ex. 2, Ap. 36). The trial court emphasized the fact that Mr. Humes spent Thursday to Monday in Seattle at home in bed and did not seek the services of a physician and stated that petitioner could have done the same aboard the vessel; that is, stayed in bed (Ap. 5, 73). The obvious answer to that contention, of course, is that, nevertheless, the bed-rest did not cure the petitioner and he was required to seek the services of a physician, which would not have been available aboard the vessel. In addition, even had the bed-rest cured the petitioner, that is now a matter of hind-sight. When one is suffering from a dread disease which has reached epidemic proportions, the availability of expert medical attention is considered imperative, whether actually used or not. Many persons suffering from virus flu or virus X or kindred diseases would be extremely reluctant to place themselves beyond the

protective nearness of expert medical attention. One of the reasons for this, of course, is that the illness may always take a turn for the worse. How many times has such illness developed complications and death resulted because of the lack of immediately available expert attention? Was the petitioner obliged to assume that his condition would improve, or might he also have assumed that he might get worse before he got better? Under the circumstances of this case petitioner was even entitled to assume that he might have been refused what medical attention was available aboard the vessel, for when he asked for a hospital slip the purser presumed to tell him that he did not need one and this action was sustained by the captain (Ap. 25, 26). Might the petitioner then not assume that a request for penicillin, for example, en route to Texas would be denied on the grounds that "he did not need it"?

Aside from his illness the undisputed evidence is that petitioner demanded the payment of his wages prior to leaving the ship. The entry in the log book stated that he demanded full payment (Ap. 18-19), but petitioner testified that he only demanded partial payment (Ap. 27). Title 46, Section 597, U.S.C.A. provides that every seaman upon demand shall be entitled to receive one-half part of the balance of his wages earned and remaining unpaid, and upon the failure of the master to comply the seaman is released from his contract. Whether the seaman's demand is for half or full wages would appear to be immaterial as long as the captain was aware of the demand for

wages. In this respect this case falls squarely within the holding in *In re Williams*, 139 F.(2d) 262.

At most it can be said in this case as was said in the *Magee* case (*Magee v. Ross*, Fed. Cas. No. 8944) that the petitioner left the ship under a belief that he had a right to do so and that the treatment that he had received from the captain had dissolved his contract. Even, as in the *Magee* case, if he were mistaken on these points, that is to say, mistaken as to his rights under the circumstances, it was an honest mistake and not a "mutinous resoluton" and his conduct both before and after the incident shows that he had a sincere confidence in his opinion and was "willing to bring it to a fair test."

II.

The District Court erred in assessing an excessive penalty under the circumstances (Specification of Error 3).

Even if the petitioner were technically guilty of desertion, the judgment of the court appears to be excessively harsh. Petitioner's presence aboard the vessel was required by the union contract requiring them to carry winch drivers to Alaska (Ap. 67) but there was no similar requirement on a trip to Texas (Ap. 67). In fact petitioner was not replaced by the company and the vessel was fully manned within the law and in such manner that she could be operated properly on the subsequent voyage (Ap. 68). See *Scott v. Rose*, Fed. Cas. No. 12, 545.

CONCLUSION

It is respectfully submitted that the trial court erred in holding that the petitioner was not justified in leaving the vessel and was guilty of desertion and that this court should reverse the judgment of the trial court accordingly.

Respectfully submitted,

BASSETT & GEISNESS,

Proctors for Appellant.

No. 12,038

In the United States Court of Appeals
for the Ninth Circuit

JOHN E. HUMES, APPELLANT,

vs.

ALASKA TRANSPORTATION COMPANY, A CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION

BRIEF FOR THE UNITED STATES

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Admiralty Rule 42	1, 2, 4, 5, 8, 10, 16

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12038

JOHN E. HUMES, APPELLANT,

vs.

ALASKA TRANSPORTATION COMPANY, A CORPORATION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Western District of Washington, Northern Division, Honorable John C. Bowen, District Judge, (R. 3-6, 72-75) is not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1291 by a notice of appeal allowed and filed August 11, 1948 (R. 9), from a final order of the United States District Court for the Western District of Washington entered May 17, 1948 (R. 7-8).

The jurisdiction of the District Court was invoked under 28 U.S.C. 1333(1) by a petition under Admiralty Rule 42

for restoration of a seaman's wages deposited into registry of court pursuant to R.S. 4604 (46 U.S.C. 706).

STATUTES AND RULE OF THE COURT INVOLVED

The pertinent provisions of the statutes are set forth in the Appendix A, *infra*, pp. 20-23.

Admiralty Rule 42 appears in the argument, *infra*, p. 5.

QUESTIONS PRESENTED

1. Whether the operating owner of a vessel is a necessary party to a proceeding by a seaman under Admiralty Rule 42 for restoration of wages deposited into registry of court pursuant to R.S. 4604 (46 U.S.C. 706).

2. Whether on a petition under Admiralty Rule 42 for restoration of wages deposited into registry of court, the burden of proving absence of desertion is on a petitioner who left his ship without permission, made no attempt to rejoin her and was properly logged as a deserter in accordance with R.S. 4596 and 4597 (46 U.S.C. 701-702).

3. Whether in the special circumstances of the case the district court erred in mitigating the forfeiture, pursuant to R.S. 4596 (46 U.S.C. 701) and R.S. 4610 (46 U.S.C. 711), by reducing it to \$200.00.

STATEMENT

This was a petition, pursuant to Admiralty Rule 42, by John E. Humes, a former member of the crew of the *MS Clove Hitch*, a vessel operated by Alaska Transportation Company, for restoration of wages deposited into registry of court, pursuant to R.S. 4604 (46 U.S.C. 706), as a result of the vessel's master having logged him as a deserter as required by R.S. 4596-4597 (46 U.S.C. 701-702). The petition was oral, contrary to the plain intention of Rule 42, and no copy of the petition was served on the United States as required by the Rule. Although petitioner was bound to know by the plain language of the statutes (R.S. 4604 and 4545; 46 U.S.C. 706, 628) that the United States was the adverse party to his claim within the meaning of Rule 42, he ignored the Government in pretended reliance upon an alleged "custom" that the

status of the United States as the indispensable adverse party might be ignored contrary to the statute and the Admiralty Rule.¹

Testimony was taken on two different days (R. 16, 31). On the first day the entries in the official log book required to establish the charge of desertion were introduced (R. 18-19) and the testimony of the petitioner taken (R. 25-28). On the second day representatives of the operator appeared pursuant to an informal request by the district court "to present any testimony they so desired * * * to give testimony if they wanted to as well as the seamen" (R. 31). The petitioner testified again (R. 32-43) and the operator, pursuant to the court's request, offered the testimony of its personnel manager (R. 43-71). Although in the course of this testimony the court referred to the operator as "respondent," at no time did the operator enter any formal appearance in the case nor file any pleadings whatsoever. After receiving evidence, the district court adjudged the moneys in registry forfeited to the United States. Exercising the discretion granted by R.S. 4596 (46 U.S.C. 701) and R.S. 4610 (46 U.S.C. 711), to reduce the penalty to an amount not less than one-third the original amount, the district court directed the forfeiture of \$200.00 to the United States and the restoration of \$153.86 to the petitioner.

While the district court in its opinion, as in the course of the taking of the personnel manager's testimony, speaks (R. 3) as if petitioner and the shipowner were adverse parties, it does not appear that he treated them as such. No costs were awarded the operator and the order of judgment was submitted by counsel for the petitioning seaman.

The petitioner was dissatisfied with the action of the district court and the appeal to this Court followed.²

¹ The district court also failed to give notice to the United States of the pendency of the proceeding, but on the contrary proceeded entirely *ex parte*.

² Instead of being entitled "*Humes v. A certain fund in registry*," or "*In re Humes*," as has been the past practice in similar cases (see e.g. *In re Williams*, (4th Cir., 1943) 139 F. 2d 262), the case has been entitled "*Humes v. Alaska Transportation Co.*," although the latter firm has no interest in the matter and has made no claim of any kind in the proceedings.

ARGUMENT

I

Petitioner and the United States Are the Only Claimants to the Fund under the Statute and the Only Real Parties in Interest; No Basis for Requiring the Presence of the Vessel Operator Is Disclosed

Once the master or owner of a vessel has accounted for and turned over to the shipping commissioner, in accordance with R.S. 4604 (46 U.S.C. 706), the wages and effects of a seaman who left the ship and did not return and whom he was therefore required to log as a deserter in accordance with R.S. 4596-4597 (46 U.S.C. 701-702), the interest of the master and owner in the matter ends. Only the United States and the seaman, the two competing claimants to the fund, remain concerned.

Having complied with the provisions of the statute and relieved themselves of liability to penalties for non-compliance, the master and owner have no further interest. In no event can they receive any benefit from the disposition of the fund, whether forfeited to the United States or restored to the seaman. The only party, other than the seaman, with any interest in the matter is the United States as responsible for enforcement of the penalty and, secondarily, as the custodian of the fund for the relief of seamen. The presence in the proceedings of the shipowner who is not a party in interest is neither necessary nor proper but is highly undesirable. Alaska Transportation Company should not have been treated as in any respect a respondent below and ought now to be dismissed by this Court. As it has asked to be dismissed, the United States is not obliged to make a similar motion.

A. The seaman's petition is but another instance of a claim under Admiralty Rule 42 (see, *infra*, p. 5) to a fund held in registry. It differs in no respect from any other claim under Rule 42 nor from the similar claim to the fund consisting of the wages and effects of a deceased seaman deposited pursuant to R.S. 4538-4539, 4541-4543 (46 U.S.C. 621-622, 624-626). Indeed, R.S. 4604 (46 U.S.C. 706) specifically directs that the same procedure is to be followed.

Rule 42, prescribing the procedure for asserting claim to proceeds in registry, with emphasis supplied, provides:

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene pro interesse suo for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice.

There is clearly no basis for contending that a seaman who has abandoned his ship without leave is not within the expression "any person," the proceeds of the seaman's wages and effects within the meaning of "any proceeds in registry" and the United States as claimant of the fund the sole or at least the chief of the "adverse parties" to whom notice must be given. Suggestions that some different procedure should be prescribed by local rule of court are therefore footless. (See Appt's memo. on motion to dismiss, p. 6).

Like all petitions for proceeds in registry, a copy of the seaman's petition should, if possible, be served upon any party having an adverse interest. Cf. 3 Benedict, *Admiralty*, (6th ed., 1940) p. 283. But the court must adjudicate the rights of the claimant to the fund even though the United States fails to appear and object to his petition. *In re Zanicki*, (D. Mass., 1946) 65 F. Supp. 447; *In re Holmberg's Estate*, (N.D. Calif., 1912) 193 Fed. 260; cf. *Rostron v. The Water Witch*, (S.D. N.Y., 1890) 44 Fed. 95; *Dent v. Radman*, (E.D. N.Y., 1880) 1 Fed. 882, 889. See 3 Benedict, *Admiralty*, (6th ed., 1940) §§ 452-453. But where the petition is met by formal objection on the part of the Government or a claim that the fund is forfeited or escheated to the United States is made, the matter will not be disposed of in summary proceedings but should be set down for more formal hearing. *In re Myers*, (S.D. N.Y., 1948) 74 F. Supp. 154. Moreover, any other party besides the United States who claims an interest in the fund may also file a petition or intervene. Cf. *In re Mitchell*, (D. Ore., 1948) 84 F. Supp.

871; *In re MacDonald*, (S.D. N.Y., 1917) 248 Fed. 983; *In re Johnson*, (S.D. N.Y., 1916) 251 Fed. 319.

The affirmative interest of the United States in the fund in registry is expressly declared in R.S. 4604 and 4545 (46 U.S.C. 706, 628) and has been repeatedly recognized. Thus *In re Buckley*, (D. Mass., 1929) 33 F. 2d 615, 616, where a public administrator claimed the wages of a deceased seaman deposited in registry, holds that "If unclaimed, it ought to go * * * into the fund to help other seamen who are ill or disabled." See also *In re Escheat of Moneys*, 1948 A.M.C. 264, 358 Pa. 133, 57 A. 2d 256. And the duty of the United States Attorney to proceed in the matter has long been recognized. See 14 Op. A. G. 520, 521; 1 Comp. Gen. 557. In *United States v. Grant*, (D. Mass., 1914) 224 Fed. 644, the United States sued for the return of certain amounts deducted from the wages of deceased seamen deposited in the court's registry. And in *Stevenson v. Hare*, (N.D. Calif., 1874) 23 Fed. Cas. No. 13,416, the right of the United States, as represented by the shipping commissioner, to recover for moneys and penalties not turned over by the shipowner is clearly recognized.

B. Normally, of course, the United States, to whom the fund is forfeited or escheats, is the sole interested party besides the petitioner. Thus it is only to the Government's representatives—the shipping commissioner (who has custody of the shipping articles and the official log, including petitioner's wage account) and the law officers of the Government, the Attorney General and the United States Attorney (who are charged with protecting the Government's interest in the fund)—that notice of petitioner's claim to the fund in registry must be given.

There would seem to be no doubt that other parties may be cited, although ordinarily no others are interested and are under no obligation to appear.³ Anyone with an actual

³ Cf. *In re Mitchell*, (D. Ore., 1948) 84 F. Supp. 871, where the operating company claimed the right to recover maintenance out of the fund. One of the many undesirable aspects of participation by the operating companies is that they have often attempted to influence masters to waive desertion and thus settle the claim to the prejudice of the United States to whom the forfeiture belongs.

interest in the fund in registry may intervene at any time. *The Hammond*, (S.D. Fla., 1926) 17 F. 2d 118; *The Com-mack*, (S.D. Fla., 1925) 3 F. 2d 704; *The Mary Anne*, (D. Me., 1826) 16 Fed. Cas. No. 9,195; *Schuchardt v. Ship Angelique*, (1856) 19 How. 239, 241. But the law is settled that one who, like the ship operator, “has merely a collateral interest in some question involved in the suit and has no actual concern in the subject-matter of it, cannot be allowed to intervene in the proceedings.” *The Lottawanna*, (1873) 20 Wall. 201, 222; *The Cartona*, (2d Cir., 1924) 297 Fed. 827.

It does not seem that the cases of *In re Williams*, (4th Cir., 1943) 139 F. 2d 262; *In re Zanicki*, (D. Mass., 1946) 65 F. Supp. 447, and *In re Mitchell*, (D. Ore., 1948) 84 F. Supp. 871, relied on for the view that the operator is a necessary and proper party, constitute, when examined, any authority for holding that a private operator is a proper party except in the exceptional circumstances where he makes a claim to the fund adverse to that of the petitioner and the United States. In the *Williams* case (the only one of the three cases not involving a vessel owned and operated by the United States) the report discloses that the operator did not appear on the appeal and similarly in the district court, “although given notice of the petition and of the hearing, did not appear and was not represented” (139 F. 2d at 262).

The rule that the operator is not a proper party is not controverted by the government vessel cases. In the *Zanicki* case the reference to giving notice to the Government’s ship master as well as to the other government representatives is insufficient to establish that where privately operated vessels are involved notice must or even should be given the private operator.⁴ In the *Mitchell* case, although the report refers to a claim of the “owners,” that

⁴ The opinion states that the vessel involved, SS WILLIAM PACA, was operated by Calmar Steamship Corporation. In fact, however, the vessel was owned and operated by the United States and Calmar was only ship’s husband or shoreside business agent of the United States while the master was a civil-service employee of the United States.

vessel too was owned and operated by the United States. The New York office of the Admiralty and Shipping Section of the Department of Justice had negotiated a suggested settlement of the case to be submitted by the local United States Attorney for the court's consideration and approval. What the opinion refers to as letters from the "owner" appear to have been letters from the claim office of the ship's husband or general agent which the United States employed to attend to the vessel's accounting and other shoreside business. No claim was submitted by the "owner" because it had already been taken into account by the law officers of the United States in negotiating the settlement and the agent's claim department could appear only through them. Cf. *United States v. Moran*, (S.D. N.Y.) 1946 A.M.C. 1530.

It thus appears that in no reported case was a private shipowner actually represented before the court despite any obiter remarks about its role in such proceedings. But apparently from fear that the court's finding on the seaman's petition under Rule 42 might adversely affect decision of a possible later suit by the seaman against the shipowner,⁵ and in hope of buying peace from such a suit by the deserter by aiding him in having the charge of desertion removed, shipowners have recently attempted to participate in the proceedings.

Ordinarily the position of the operator is hostile to the United States and favorable to the seaman and this improper practice now appears to have become so common as to have been by some accepted as permissible. Inquiry by the Department of Justice has disclosed, however, that in many courts the practice has grown up that instead of insisting that the seaman serve copies of his petition on the United States as required by Rule 42 and give notice of the seaman's petition to the deputy shipping com-

⁵ It is obvious, of course, that decision on the seaman's petition for the fund in registry, being a suit in rem, cannot be *res judicata* between the seaman and the shipowner unless the latter joins issue with petitioner. Cf. *The Nevada*, (9th Cir., 1926) 11 F. 2d 511, 513; *The Ethel*, (5th Cir., 1895) 66 Fed. 340, 342; *The Monte A*, (S.D. N.Y., 1882) 12 Fed. 331, 333.

missioner, the United States Attorney and the Attorney General, as is necessary to enable the Government to protect its interest in the fund, notice is given only to the shipowner. who, if not disinterested, is hostile to the forfeiture to the Government.

Reports have even been received that, in clear violation of 18 U.S.C. 283, district court clerks have often aided deserters in preparing and having considered ex parte, petitions for restoration predicated on letters from masters and operators that *they* (not the United States) desired to "waive" the forfeiture. It seems obvious that the master, like any other complaining witness in a forfeiture proceeding, has no authority to decide whether the United States will enforce or waive the penalty. Clerks and masters are but exposing themselves to criminal prosecution. But so serious is the confusion that in the case of *In re Williams*, (4th Cir., 1943) 139 F. 2d 262, 263, the court held not only that the seaman did not have the burden of proof to overcome the inference of desertion arising from his quitting his ship and never returning, but that the burden was on the *shipowner* to prove the seaman's subjective intent at the time he left.⁶

C. In the present case, however, Alaska Transportation Company merely accepted the invitation of the judge to offer testimony in the proceedings, while asserting no claim to the fund, as a public service to aid in the proof of the facts, and now finds itself regarded as a party. But its presence has occasioned no harm—unless proof of the truth be so regarded. The United States submits that it is entitled to insist upon the dismissal of the shipowner as improperly joined. But, as it appears that the owner now desires to proceed no further and likewise seeks dismissal,

⁶ This position ignores the fact that the shipowner, once having escaped the penalty to the United States by turning over the deserter's wages and effects to the shipping commissioner, is often only too happy to condone the deserter's conduct so as to escape harassment by the deserter and his union. Since the *Williams* case the matter has been corrected in the Fourth Circuit and the Government is now permitted to protect its interests in cases at Norfolk and Baltimore.

any possible controversy is removed. Having appeared voluntarily there may be doubt as to its right to recover costs against appellant, but as it asks none, there would seem to be no problem. It should be dismissed in accordance with its request.

II

Petitioner Having Abandoned His Ship So As to Compel the Master to Cause His Wages and Effects to Be Deposited in Registry, the Burden of Proving That He Did Not Desert Was on Petitioner and the Court Below Correctly Held He Failed to Sustain It

The present proceeding is analogous to any other petition under Admiralty Rule 42 to obtain possession of funds held in registry. The burden is thus upon the seaman as on every other claimant of funds in registry to establish by proper evidence the claim stated in his petition. He must allege and prove that when he abandoned his ship he did not intend to desert although he left the vessel and failed to return before the end of the voyage.

The fact of petitioner's continued absence without leave is proved by the entries, required to be made in the official log book under penalty by R.S. 4597, 4292 (46 U.S.C. 702, 203) and the pay-off copy of the shipping articles, both of which it was the duty of the deputy shipping commissioner to produce and which were made available to the court here. Under 28 U.S.C. 1732 and R.S. 4597 (46 U.S.C. 702), these official documents, made in the regular course of the ship's business under penalty of law, stand as uncontroverted evidence of the events and transactions stated therein.⁷ In the nature of the matter they leave open to dispute only the subjective intention of the petitioner in continuing to absent himself from the vessel or his explanation of his inability to return. But, as such matters are exclusively within the

⁷ Compare British Merchant Shipping Act, 1854, Appendix C. *infra*, pp. 28-31. See *The Ariel*, (2d Cir., 1941) 119 F. 2d 866; *Malone v. Bell*, (D. Pa., 1805) 16 Fed. Cas. No. 8,994; *Douglass v. Eyre*, (E.D. Pa., 1830) 7 Fed. Cas. No. 4,032, at p. 978.

knowledge of petitioner, he, as the moving party, not the United States, must bear the burden of their proof.

A. Revised Statutes 4596 (46 U.S.C. 701(1)) provides that a seaman shall be punished for desertion "by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned." The statutes prescribe a special procedure for enforcement of this penalty by payment into registry followed by adjudication of the question of desertion by the court when the seaman petitions for restoration of the proceeds in registry. The successive steps in this statutory procedure are as follows: *First*, R.S. 4597 (46 U.S.C. 702) requires entry of the desertion to be made by the master and mate "in the official log book on the day on which the offense was committed" in order that "in any subsequent legal proceedings the entries * * * shall * * * be produced or proved," *Second*, R.S. 4604 (46 U.S.C. 706) requires that the seaman's effects and wages thus forfeited must, under penalty of double the amount thereof, "be paid by the master or owner to any shipping commissioner resident at the port at which the voyage of such vessel terminates," who in turn must deposit them into registry of court for disposition, and *Third*, R.S. 4545 (46 U.S.C. 628) prescribes the method of disposition by the court and authorizes the making of a claim for their restoration.

Nothing in the statutes supports appellant's view that any discretion as to the extent of the forfeiture lies with the master or owner. On the contrary, reading R.S. 4596 (46 U.S.C. 701) with R.S. 4610 (46 U.S.C. 711), it is clear that courts alone are granted the power of mitigation. In its original form in the 1874 Revised Statutes, R.S. 4596 as derived from section 51 of the 1872 Act (*infra*, p. 25), also contained a provision for imprisonment, yet it may be doubted that appellant would then have the hardihood to suggest that imprisonment was in the discretion of the master. Certainly no case has ever held that the master might exercise discretion and turn over to the shipping commissioner as forfeited any smaller amount than the full

wages due the seaman less the deductions for expenses as permitted by the statute (R.S. 4604; 46 U.S.C. 706).⁸

Prior to the adoption of the 1874 Revised Statutes there was no possibility of dispute respecting the procedure for enforcement of the penalties for desertion. Nor was there opportunity for such errant nonsense as appellant's assertion that the burden is not on the petitioning seaman to prove that when he abandoned his ship and never attempted to return, still he lacked the *animus non revertendi* essential to desertion. Unexcused absence of a seaman, exceeding forty-eight hours, duly entered in the official log and crew list and duly authenticated before an American consul abroad, or a notary public at home, was explicitly declared prima facie proof of desertion and of the forfeiture of the seaman's wages and effects to the United States. By Section 5 of the Seamen's Act of 1790 (Appendix B, *infra*, pp. 23-24) such forfeiture was expressly prescribed for absence continuing more than forty-eight hours, provided the entries required under penalty of law were made in the log book kept by the vessel. *The Union v. Jansen*, (S.D. N.Y., 1837) 24 Fed. Cas. No. 14,348 at p. 546; *Cloutman v. Tunison*, (D. Mass., 1833) 5 Fed. Cas. No. 2,907 at p. 1094; see *The Martha*, (S.D. N.Y., 1830) 16 Fed. Cas. No. 9,144 at p. 861. By Section 25 of the Diplomatic and Consular Act of 1856 (Appendix B, *infra*, pp. 24-25) the law of 1790 was supplemented and amended by giving the forfeiture to the United States, instead of to the shipowner as provided by the 1790 Act, and by requiring the entry of the continued absence to be

⁸ As the Attorney General ruled in the early days of the 1872 Act, the property is "held by the master as forfeited, and the law forbids the master or owner of the vessel to keep it, but directs that it shall be held by the judge * * * The law does not require that there shall be an actual judgment of forfeiture before it becomes the duty of the master to pay over to the shipping commissioner. If it were so, there would seldom be a case of forfeiture, and the fund for disabled seamen would not be benefited largely from this source" (14 Ops. A. G. 520, 521). Were a master to attempt to remit any part of the forfeiture and not deposit the full amount, there is no doubt that suit for the amount withheld and penalties would be instituted on behalf of the United States. Cf. *Stevenson v. Hare*, (N.D. Calif., 1874) 23 Fed. Cas. No. 13,416.

made and authenticated upon the crew list, an official document required to be deposited with the collector upon entry of the vessel. Finally, the Shipping Commissioner's Act of 1872 (Appendix B, *infra*, pp. 25-27) further amended the Acts of 1790 and 1856 by prescribing that an *official* log was to be kept in which entry of desertion was to be made and commanding the master or owner to turn over the seaman's wages and effects to the shipping commissioner at the port of discharge, who should deposit the proceeds promptly into registry of court.

The absence of any intent on the part of the draftsmen of the 1872 Act to repeal the earlier Acts of 1790 and 1856 is obvious not only from this internal analysis of their several provisions, but also from the legislative history. It is traditional that the purpose of the 1872 Act was to reproduce in American legislation such provisions of the British Merchant Shipping Act of 1854 as were not already covered by existing United States statutes.⁹ The failure to include any provision corresponding to Section 250 of the British Act (Appendix C, *infra*, p. 29), regarding proof of the statutory conditions for forfeiture, thus shows plainly that the draftsmen regarded Section 25 of the 1856 Act as still remaining in force. Had the 1856 Act been intended to be repealed, something like Section 250 would have been enacted in its place. Without such a provision the internal economy of the body of statutory law would have been destroyed.

The Acts of 1790, 1856 and 1872 when thus all read together constituted a harmonious and workable whole. The rights and duties of the respective parties—the owner and master, the absent seaman, and the United States—were simple, certain and easily understood. The Commissioners who prepared the Revised Statutes, however, mutilated this workable system created by reading together the Acts of 1790, 1856 and 1872. They omitted the Acts of 1790 and 1856 without inserting into the 1872 Act's provisions those parts of the earlier statutes necessary to make

⁹ See statements made and letters read during debate on the bills, 89 Cong. Globe 1206, 102 Cong. Globe 1836, 2174, 2207.

the statutory scheme easily workable and understandable.¹⁰ But while these omissions seem obviously to have been erroneous we do not urge this Court to attempt their resuscitation now. In view of the general revisions effected by the Acts of December 21, 1898, c. 28, 30 Stat. 760, and March 4, 1915, c. 153, 38 Stat. 1147, it might be questioned if the matter is still open.¹¹

The Revised Statutes as amended and now in effect are still workable provided they are construed in the light of their history. Thus construed it is obvious that, although the certainty of the forty-eight hour absence fixed by the 1790 Act is gone, a seaman's continued absence without leave when it extends for an unreasonable time still establishes *prima facie* desertion susceptible of being proven by the succession of daily entries in the log which the ship's officers are required to make under penalty. When thus established, the master is obliged at the voyage end, again under penalty, to turn over the absent seaman's wages and effects for deposit into registry where they stand forfeit to the United States unless the seaman on his petition claiming their restoration shall plead and prove that his apparent desertion was not such in law because he did not have the *animus non revertendi*, but, on the contrary, always intended to return to the ship.

Where relevant, as in cases where desertion is denied or mitigating circumstances are invoked, it is logically obvi-

¹⁰ See 2 Commissioner's Drafts (1872) pp. 2205, 2209 (titles 51-57, Commerce and Navigation, pp. 229, 233). This may have been done on the basis of Judge Lowell's decision in *Scott v. Rose*, (D. Mass., 1874) 21 Fed. Cas. No. 12,545, referred to by Judge Addison Brown without approval in *Welcome v. The Yosemite*, (S.D. N.Y., 1883) 18 Fed. 383, and *Brink v. Lyons*, (S.D. N.Y., 1883) 18 Fed. 605, that the 1872 Act repealed that of 1790. There is certainly slight basis for Judge Lowell's construction when we note the insufficiencies of the 1872 Act when read alone and consider the rule that repeals by implication are not favored.

¹¹ It must be recognized, however, that the legislative history of neither of those revisions suggests there was any consideration of the question of forfeiture. Both were solely concerned with the reduction and final elimination of imprisonment for desertion.

ous that this proof of petitioner's subjective state of mind and of his intervening whereabouts must rest wholly upon himself. Ordinarily, he is the sole source of any information. No one but the petitioning seaman can ever offer anything better than remote circumstantial evidence. See *Spencer v. Eustis*, (1842) 21 Me. 519, 38 Am. Dec. 277; *In re Murphy*, (S. D. N. Y., 1947) 73 F. Supp. 710.

B. Petitioner's reliance on cases like *The City of Norwich*, (2d Cir., 1922) 279 Fed. 687, 698, is unfounded. That case, like the case of *The Two Sisters*, (1843) 2 W. Rob. 125, 138, 166 Reprint 702, upon which it in turn relies, was not a petition for proceeds deposited in registry because the seaman abandoned his ship and never rejoined. In both cases the seamen sued the shipowners and the latter admitted the seamen's allegations but pleaded as a defense that the wages were forfeited for desertion. In both the plaintiff seamen had gone ashore without leave and their claim was that when they returned the master excluded them from the ship so that they were wrongly discharged. In such circumstances it is obvious that proof of desertion fell upon the shipowner who pleaded it as a defense.

Nor does *In re Williams*, (4th Cir., 1943) 139 F. 2d 262, really help petitioner. When examined, far from being an authority for petitioner, the case appears merely to indicate the danger of unguarded dicta in opinions written without the court having the benefit of briefing and argument by the United States as well as the petitioning seaman. In both courts the entire proceeding was *ex parte*; the Department of Justice apparently first learned of the case from its publication in the Federal Reporter. Although the United States was the only interested party, it was not cited or served with a copy of the petition, had no notice and did not appear in either the district or the appellate court. The operating company, although it had no legal interest, wrote a letter to the court. And it was on the strength of this slender act that the court made the statement, relied on by appellant here, that "The burden to prove desertion rested on the shipowner * * * but no proof was offered on its behalf" (p. 263). The court's

statement is plainly erroneous. Moreover, the report shows that in fact the petitioning seaman's testimony more than sustained his burden of proof although the dictum of the court appears to relieve him of it.

Thus, in reality, neither case is authority for appellant's contention that a seaman who abandons his ship and never returns to her must be awarded the fund in registry upon his mere demand unless some other party appears and proves that his subjective intent amounted to an *animus non revertendi*.

C. The correct rule is fully explained by analysis of the relation of the parties to the different types of litigation and what they must plead and prove. As pointed out in *In re Zanicki*, (D. Mass., 1946) 65 F. Supp. 447, 449, if the seaman contends he did not desert, he may litigate the question either by suit against the shipowner or by a petition under Rule 42, claiming the proceeds of his wages and effects held in registry of court. The burden of proof depends upon which course the seaman elects and on what defense the shipowner interposes.

If the seaman chooses to bring suit against the shipowner for his wages and the owner pleads as a defense the seaman's desertion and forfeiture of wages, the shipowner must prove the desertion and forfeiture which he has pleaded. *The City of Norwich, supra*; cf. McKelvey, *Evidence*, (5th ed., 1944) p. 95, n. 4. If the seaman sues and the owner pleads, instead, only the seaman's continued absence without leave, whereby the master was required, under penalty of law, to log him as a deserter and to turn over all his wages and effects for deposit in registry, the shipowner must prove the facts which he has thus alleged as a defense and no more. The owner will be dismissed and the seaman remitted to his claim for the proceeds held in registry as forfeited to the United States.

While no American case appears to have discussed the point, it seems self-evident that on such a defense the shipowner will be dismissed if he prove no more than the plaintiff's continued absence and full payment into registry as required by law. Under the British legislation, from which

our own is copied,¹² the distinction between the two cases was well settled over a hundred years ago and is no longer litigated. When the master, in accordance with the statute, turns over the wages and effects of a seaman logged as a deserter or of one who died at sea, it is a valid discharge to the extent of the payment but does not, of course, bar suit and recovery for any amount the master had not paid over. *The Vibilia*, (1829) 2 Hagg 228, 166 Reprint 227; *Armstrong v. Smith*, (1805) 1 Bos. & Pul. (NR) 299, 127 Reprint 477. If the defendant proves full payment as required by the statute, he is dismissed. But if the plea is desertion rather than disposition according to the statute, the defendant shipowner must prove actual desertion and nothing short of it will do. *Frontine v. Frost*, (1802) 3 Bos. & Pul. 302, 127 Reprint 167, explained in *The Baltic Merchant*, (1809) 1 Edw. Ad. 86, 165 Reprint 1041.

But the burden of proof is otherwise when the seaman comes to petition for the restoration of the proceeds of his wages and effects held in registry; the burden of proof is then reversed. He is the moving party and must prove that he is entitled to the fund in registry. The seaman, who leaves his ship and abandons his wages and effects, so that the master, under penalty of the law, must turn them over to the shipping commissioner for deposit into registry, when he petitions for their restoration has the whole burden of proof. The seaman, not the shipowner, must prove that his apparent desertion, in fact, was not desertion, in law, because he had the *animus revertendi*. This is so because in neglecting to return before the pay-off the seaman has placed himself in the position of the moving party in seeking his wages and as such must bear the

¹² See statements in the Congressional debates, *supra*, p. 13, fn. 9. For the successive development of the British legislation respecting disposition of wages of seamen deserting or dying, see 11 & 12 Will. III, c. 7, s. 17 (1700); 2 Geo. II, c. 36, ss. 3, 6, 9 (1729); 37 Geo. III, c. 73, ss. 1, 7-9 (1796); 4 Geo. IV, c. 25, ss. 9-11 (1823); and 5 & 6 Will. IV, c. 19, ss. 9, 25, 53 (1835), culminating in the Merchant Shipping Act, 1854, 17 & 18 Vict., c. 103, which formed the basis in the United States of the Shipping Commissioner's Act, 1872, 17 Stat. 262.

burden of proof. Unlike the cases of the seaman's suits against the owner, who if he once admits owing the wages is under the burden of explaining why he should not pay them, the presence of the seaman's wages in registry shows he once abandoned them and if he wants them must now explain why he is entitled to them.

No American decision except the *Williams* case, which we believe is clearly erroneous, has discussed the burden of proof. We believe, however, that every other reported case shows that the court treated the seaman as having the burden as the petitioning party. See esp. *In re Murphy*, (S.D. N.Y., 1947) 73 F. Supp. 710; *In re Mitchell*, (D. Ore., 1948) 84 F. Supp. 871; *In re Magdaloyo*, (S.D. N.Y.) 1948 A.M.C. 1896. And even the *Williams* case shows that petitioner had in fact fully satisfied that burden.

Turning to the facts of record in the present case there appears no doubt of the complete correctness of the decision of the court below. The testimony of petitioner, even when favorably presented in appellant's brief, falls far short of justifying his quitting his ship and flying to Seattle. The district court had the advantage of observing the witness' demeanor and its findings in admiralty as at law should not be disregarded unless clearly erroneous, which they plainly are not.

III

The Court's Action in Mitigating the Penalty So As to Forfeit Only \$200.00 Was Just and Reasonable

The district court, upon consideration of the mitigating circumstances of appellant's fear of the "epidemic of virus X" (R. 5), determined pursuant to authority granted by R.S. 4596 (46 U.S.C. 701) and R.S. 4610 (46 U.S.C. 711) that the forfeiture of appellant's wages should be reduced to only \$200.00. The statute only declares prior established law. *Swain v. Howland*, (D. Mass., 1858) 23 Fed. Cas. No. 13,661. The trial court's discretion should not be hampered.

In view of the very slight justification furnished by the circumstances, it appears that the court below in reducing the penalty to the equivalent of a small fine was un-

usually generous. Since appellant had already collected all of his wages except \$353.86, it would seem that a total forfeiture ought to have been decreed. Certainly better causes for abandoning his employment have none the less cost other seamen larger sums. See e.g. *In re Murphy, supra*; *In re Magdaloyo, supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that Alaska Transportation Company should be dismissed, the United States substituted as respondent-appellee, and the order of the district court forfeiting \$200.00 to the United States affirmed.

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Assistant Attorney General.
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NOVEMBER 1949

APPENDIX A

Statutes Involved

R. S. 4596 (as amended, 46 U.S.C. 701), derived from Section 51 of the 1872 Act, *infra*, p. 25, and Section 243 of the British Act, *infra*, p. 28, provides in pertinent part:

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

R. S. 4597 (as amended, 46 U.S.C. 702), derived from Section 52 of the 1872 Act, *infra*, p. 25, and Section 244 of the British Act, *infra*, p. 28, provides:

Upon the commission of any of the offenses enumerated in section 701 of this title an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense.

R. S. 4290 (as amended, 46 U.S.C. 201), derived from Section 58 of the 1872 Act, *infra*, p. 26, and Section 282 of the British Act, *infra*, p. 30, provides in pertinent part:

Every vessel making voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall have an official log book; and every master of such

vessel shall make, or cause to be made therein, entries of the following matters, that is to say:

* * * * *

Second. Every offense committed by any member of his crew for which it is intended to prosecute, or to enforce a forfeiture, together with such statement concerning the reading over such entry, and concerning the reply, if any, made to the charge, as is required by the provisions of section 702.

* * * * *

Ninth. The name of every seaman or apprentice who ceases to be a member of the crew otherwise than by death, with the place, time, manner, and cause thereof.

R. S. 4291 (46 U.S.C. 202), derived from Section 59 of the 1872 Act, *infra*, p. 27, and Section 281 of the British Act, *infra*, p. 30, provides:

Every entry required to be made in the official log book shall be signed by the master and by the mate, or some other one of the crew, and every entry in the official log book shall be made as soon as possible after the occurrence to which it relates, and, if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence, and of the entry respecting it; and in no case shall any entry therein, in respect of any occurrence happening previously to the arrival of the vessel at her final port, be made more than twenty-four hours after such arrival.

R. S. 4292 (46 U.S.C. 203), derived from Section 60 of the 1872 Act, *infra*, p. 27, provides:

If in any case the official log book is not kept in the manner required, or if any entry directed to be made in any such log book is not made at the time and in the manner directed, the master shall, for each such offense, be liable to a penalty of not more than \$25; and every person who makes, or procures to be made, or assists in making, any entry in any official log book in respect of any occurrence happening previously to the arrival of the vessel at her final port of discharge, more than twenty-four hours after such arrival, shall,

for each offense, be liable to a penalty of not more than \$150.

Title 28 U.S.C. 1732 (Compare Section 250 of the British Act, *infra*, p. 29), provides:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

R. S. 4604, as amended (cf. 46 U.S.C. 706), derived from Section 55 of the 1872 Act, *infra*, p. 26, and Section 253 of the British Act, *infra*, p. 29, provides:

All clothes, effects, and wages which, under the provisions of this title, are forfeited for desertion, shall be applied, in the first instance, in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place, and the balance, if any, shall be paid by the master or owner to any shipping commissioner resident at the port at which the voyage of such vessel terminates; and the shipping commissioner shall account for and pay over such balance to the judge of the district court within one month after the commissioner receives the same, to be disposed of by him in the same manner as is prescribed for the disposal of the money, effects, and wages of deceased seamen. Whenever any master or owner neglects or refuses to pay over to the shipping commissioner such balance, he shall be liable to a penalty of double the amount thereof, recoverable by the commissioner in the same manner that seamen's wages are recovered. In all

other cases of forfeiture of wages, the forfeiture shall be for the benefit of the master or owner by whom the wages are payable.

R. S. 4545 (as amended, 46 U.S.C. 628), derived from Section 50 of the 1872 Act, *infra*, p. 25, provides:

A district court, in its discretion, may at any time direct the sale of the whole or any part of the effects of a deceased seaman or apprentice, which it has received, and shall hold the proceeds of such sale as the wages of deceased seamen are held. When no claim to the wages or effects or proceeds of the sale of the effects of a deceased seaman or apprentice, received by a district court, is substantiated within six years after the receipt thereof by the court, it shall be in the absolute discretion of the court, if any subsequent claim is made, either to allow or refuse the same. Such courts shall, from time to time, pay any moneys arising from the unclaimed wages and effects of deceased seamen, which in their opinion it is not necessary to retain for the purpose of satisfying claims, into the Treasury of the United States, and such moneys shall form a fund for, and be appropriated to, the relief of sick and disabled and destitute seamen belonging to the United States merchant marine service.

R. S. 4610, as amended (cf. 46 U.S.C. 711) derived from Section 64 of the 1872 Act, *infra*, p. 27, provides in pertinent part:

* * * *Provided always*, That it shall be lawful for the court before which any proceeding shall be instituted for the recovery of any pecuniary penalty imposed by this Act to mitigate or reduce such penalty as to such court shall appear just and reasonable; but no such penalty shall be reduced to less than one-third of its original amount: * * *

APPENDIX B

Prior American Statutes

Merchant Seamen's Act of July 20, 1790, c. 29, 1 Stat. 131, 133, provides:

SEC. 5. *And be it [further] enacted*, That if any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from

on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs, in any court or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

Diplomatic and Consular Act of August 18, 1856, c. 127, 11 Stat. 52, 62, provides:

SEC. 25. *And be it further enacted*, That whenever any seaman or mariner of any vessel of the United States shall desert such vessel, the master or commander of such vessel shall note the fact and date of such desertion on the list of the crew, and the same shall be officially authenticated at the port or place of the consulate or commercial agency first visited by such vessel after such desertion, if such desertion shall have occurred in a foreign country, or if in such case such vessel shall not visit any place where there shall be any consulate or commercial agency before her return to the United States, or the desertion shall have occurred in this country, the fact and time of such desertion shall be officially authenticated before a notary public immediately at the first port or place where such vessel shall arrive after such desertion; and all wages that may be due to such seaman or mariner, and whatever interest he may have in the cargo of such vessel, shall be forfeited to and become the property of the United States, and paid over for their use to the collector of the port where the crew

of such vessel are accounted for as soon as the same can be ascertained; first deducting therefrom any expense which may necessarily have been incurred on account of such vessel in consequence of such desertion; and in settling the account of such wages or interest no allowance or deduction shall be made except for moneys actually paid, or goods at a fair price supplied, or expenses incurred to, or for such seaman or mariner, any receipt or voucher from, or arrangement with such seaman or mariner, to the contrary notwithstanding.

Shipping Commissioner's Act of June 7, 1872, c. 322, 17 Stat. 262, provides in pertinent part:

SEC. 50. That in cases of wages or effects of deceased seamen or apprentices received by the circuit courts, to which no claim is substantiated within six years after the receipt thereof by any of the said courts, it shall be in the absolute discretion of any of such courts, if any subsequent claim is made, either to allow or refuse the same; and each of the respective courts shall, from time to time, pay any moneys arising from the unclaimed wages and effects of deceased seamen, which, in the opinion of such court, it is not necessary to retain for the purpose of satisfying claims, into the treasury of the United States, which moneys shall form a fund for, and be appropriated to, the relief of sick and disabled and destitute seamen belonging to the United States merchant marine service.

SEC. 51. That whenever any seaman who has been lawfully engaged, or any apprentice to the sea service, commits any of the following offences, he shall be liable to be punished as follows, that is to say: first, for desertion, he shall be liable to imprisonment for any period not exceeding three months, and also to forfeit all or any part of the clothes or effects he leaves on board, and all or any part of the wages or emoluments which he has then earned; * * *

SEC. 52. That upon the commission of any of the offences enumerated in the last preceding section, an entry thereof shall be made in the official log-book, and shall be signed by the master, and also by the mate or one of the crew; and the offender, if still in the ship, shall, before the next subsequent arrival of the ship at any port, or if she is at the time in port, before her departure therefrom, either be furnished with a copy of such entry,

or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit; and a statement that a copy of the said entry has been so furnished or that the same has been so read over as aforesaid, and the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid; and in any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof, the court hearing the case may, at its discretion, refuse to receive evidence of the offence.

* * * * *

SEC. 55. That all clothes, effects, and wages which, under the provisions of this act, are forfeited for desertion, shall be applied, in the first instance, in payment of the expenses occasioned by such desertion to the master or owner of the ship from which the desertion has taken place, and the balance (if any) shall be paid by the master or owner to any shipping-commissioner resident at the port at which the voyage of such ship terminates; and the shipping-commissioner shall account to and pay over such balance to the judge of the circuit court within one month after said commissioner receives the same, to be disposed of by him in the same manner as is hereinbefore provided for the disposal of the money, effects, and wages of deceased seamen; in all other cases of forfeiture of wages, under the provisions hereinbefore contained, the forfeiture shall be for the benefit of the master or owner by whom the wages are payable; and in case any master or owner neglects or refuses to pay over to the shipping-commissioner such balance aforesaid, he shall incur a penalty of double the amount of such balance, which shall be recoverable by the commissioner in the same manner that seamen's wages are recovered.

* * * * *

SEC. 58. That every ship making voyages as described in section twelve of this act shall have an "official log-book;" and every master of such ship shall make, or cause to be made therein, entries of the following matters, that is to say: First, every legal conviction of any member of his crew, and the punishment inflicted; secondly, every offence committed by any member of his crew for which it is intended to prosecute, or to enforce a forfeiture, together with such statement concerning

the reading over such entry, and concerning the reply, if any, made to the charge, as hereinbefore required; * * * ninthly, the name of every seaman or apprentice who ceases to be a member of the crew otherwise than by death, with the place, time, manner, and cause thereof; * * *

SEC. 59. That every entry hereby required to be made in the official log-book shall be signed by the master and by the mate, or some other one of the crew, and every entry in the official log-book shall be made as soon as possible after the occurrence to which it relates, and, if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence, and of the entry respecting it; and in no case shall any entry therein in respect of any occurrence happening previously to the arrival of the ship at her final port be made more than twenty-four hours after such arrival.

SEC. 60. That if in any case the official log-book is not kept in the manner hereby required, or if any entry hereby directed to be made in any such log-book is not made at the time and in the manner hereby directed, the master shall, for each such offence, incur a penalty not exceeding twenty-five dollars; and every person who makes, or procures to be made, or assists in making, any entry in any official log-book in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge, more than twenty-four hours after such arrival, shall, for each offence, incur a penalty not exceeding one hundred and fifty dollars.

* * * * *

SEC. 64. That all penalties and forfeitures imposed by this act, and for the recovery whereof no specific mode is hereinbefore provided, shall and may be recovered with costs, either in any circuit court of the United States, at the suit of any district attorney of the United States, * * * *Provided always*, That it shall be lawful for the court before which any proceeding shall be instituted for the recovery of any pecuniary penalty imposed by this act, to mitigate or reduce such penalty as to such court shall appear just and reasonable; but no such penalty shall be reduced to less than one-third of its original amount: * * *

British Merchant Shipping Act

The Merchant Shipping Act, 1854, 17 & 18 Vict., c. 104, provides in pertinent part:

243. Whenever any Seaman who has been lawfully engaged or any Apprentice to the Sea Service commits any of the following Offences he shall be liable to be punished summarily as follows; (that is to say,)

(1.) For Desertion he shall be liable to Imprisonment for any Period not exceeding Twelve Weeks, with or without Hard Labour, and also to forfeit all or any Part of the Clothes and Effects he leaves on board, and all or any Part of the Wages or Emoluments which he has then earned, and also, if such Desertion takes place abroad, at the Discretion of the Court, to forfeit all or any Part of the Wages or Emoluments he may earn in any other Ship in which he may be employed until his next Return to the United Kingdom, and to satisfy any Excess of Wages paid by the Master or Owner of the Ship from which he deserts to any Substitute engaged in his Place at a higher Rate of Wages than the Rate stipulated to be paid to him:

* * * * *

244. Upon the Commission of any of the Offences enumerated in the last preceding Section an Entry thereof shall be made in the official Log Book, and shall be signed by the Master and also by the Mate or One of the Crew; and the Offender, if still in the Ship, shall before the next subsequent Arrival of the Ship at any Port, or if she is at the Time in Port, before her Departure therefrom, either be furnished with a Copy of such Entry or have the same read over distinctly and audibly to him, and may thereupon make such Reply thereto as he thinks fit; and a Statement that a Copy of the said Entry has been so furnished, or that the same has been so read over as aforesaid, and the Reply (if any) made by the Offender, shall likewise be entered and signed in manner aforesaid; and in any subsequent legal Proceeding the Entries herein-before required shall, if practicable, be produced or proved, and in

default of such Production or Proof the Court hearing the Case may, at its Discretion, refuse to receive Evidence of the Offence.

* * * * *

250. Whenever a Question arises whether the Wages of any Seaman or Apprentice are forfeited for Desertion, it shall be sufficient for the Party insisting on the Forfeiture to show that such Seaman or Apprentice was duly engaged in or that he belonged to the Ship from which he is alleged to have deserted, and that he quitted such Ship before the Completion of the Voyage or Engagement, or if such Voyage was to terminate in the United Kingdom and the Ship has not returned, that he is absent from her, and that an Entry of the Desertion has been duly made in the official Log Book; and thereupon the Desertion shall, so far as relates to any Forfeiture of Wages or Emoluments under the Provisions herein-before contained, be deemed to be proved, unless the Seaman or Apprentice can produce a proper Certificate of Discharge, or can otherwise show to the Satisfaction of the Court that he had sufficient Reasons for leaving his Ship.

* * * * *

253. All Clothes, Effects, Wages, and Emoluments which under the Provisions herein-before contained are forfeited for Desertion shall be applied in the first instance in or towards the Reimbursement of the Expenses occasioned by such Desertion to the Master or Owner of the Ship from which the Desertion has taken place; and may, if earned subsequently to the Desertion, be recovered by such Master, or by the Owner or his Agent, in the same Manner as the Deserter might have recovered the same if they had not been forfeited; and in any legal Proceeding relating to such Wages the Court may order the same to be paid accordingly; and subject to such Reimbursement the same shall be paid into the Receipt of Her Majesty's Exchequer in such Manner as the Treasury may direct, and shall be carried to and form Part of the Consolidated Fund of the United Kingdom; and in all other Cases of Forfeiture of Wages under the Provisions herein-before contained the Forfeiture shall, in the Absence of any specific Di-

rections to the contrary, be for the Benefit of the Master or Owner by whom the Wages are payable.

* * * *

280. The Board of Trade shall sanction Forms of Official Log Books, which may be different for different Classes of Ships, so that each such Form contains Blanks for the Entries herein-after required; and an Official Log of every Ship (except Ships employed exclusively in trading between Ports on the Coasts of the United Kingdom) shall be kept in the appropriate sanctioned Form; and such Official Log may, at the Discretion of the Master or Owner, either be kept distinct from the ordinary Ship's Log or united therewith, so that in all Cases all the Blanks in the Official Log be duly filled up.

281. Every Entry in every Official Log shall be made as soon as possible after the Occurrence to which it relates, and if not made on the same Day as the Occurrence to which it relates, shall be made and dated so as to show the Date of the Occurrence and of the Entry respecting it; and in no Case shall any Entry therein in respect of any Occurrence happening previously to the Arrival of the Ship at her final Port of Discharge be made more than Twenty-four Hours after such Arrival.

282. Every Master of a Ship for which an Official Log Book is hereby required shall make or cause to be made therein Entries of the following Matters; (that is to say,)

(1.) Every legal Conviction of any Member of his Crew, and the Punishment inflicted:

(2.) Every Offence committed by any Member of his Crew for which it is intended to prosecute, or to enforce a Forfeiture, or to exact a Fine, together with such Statement concerning the reading over such Entry, and concerning the Reply (if any) made to the Charge, as herein-before required:

* * * *

(9.) The Name of every Seaman or Apprentice who ceases to be a Member of the Crew, otherwise than by

Death, with the Place, Time, Manner, and Cause thereof:

* * * * *

285. All Entries made in any Official Log Book as herein-before directed shall be received in Evidence in any Proceeding in any Court of Justice, subject to all just Exceptions.

United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Appellant,

vs.

JOHN McCORD and FLORENCE McCORD,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED
OCT 27 1948

PAUL P. O'BRIEN,

No. 12039

United States
Court of Appeals

for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
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Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,
BENJAMIN CHAPMAN,
1206 Santee Street,
Los Angeles 15, California.

For Appellees:

DESSER, RAU, CHRISTENSEN &
HOFFMAN,
325 West 8th Street,
Los Angeles, California. [1*]

* Page numbering appearing at foot of page of original
Certified Reporter's Transcript.

In the District Court of the United States for the
Southern District of California, Central Division

No. 6656 - Y

PHILIP B. FLEMING, Administrator, Office of
Temporary Controls, Office of Price Adminis-
tration,

Plaintiff,

vs.

JOHN McCORD, FLORENCE McCORD,
DOE I and DOE II,

Defendants.

COMPLAINT OF TREBLE DAMAGES AND INJUNCTION

I.

Plaintiff, as Administrator of the Office of Temporary Controls, Office of Price Administration, brings this action for an injunction and treble damages on behalf of the United States of America, pursuant to Section 205(a) to enforce compliance with Section 4 and Section 205(e) of the Emergency Price Control Act of 1942, as amended, USCA Title 50, App. Sec. 901 et seq., hereinafter referred to as "The Act", and the Rent Regulations (10 Fed. Reg. 13528) issued by the Administrator of the Office of Price Administration pursuant to Section 2 of the Act.

II.

Jurisdiction of this action is conferred upon this Court by Section 205(c) and 205(e) of the Act. [2]

III.

That the defendants, Doe I and Doe II, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered, this complaint may be amended by inserting such true names in the place and stead of such fictitious names.

IV.

Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued. If but one person is listed on the attached statement, the word "persons" as used herein, shall refer to said person.

V.

During all times herein mentioned defendant has been the owner and operator of property located at 948 South Figueroa Street, City and County of Los Angeles, and has resided in Ontario, California.

VI.

Defendant received from persons for the use and occupancy of the hereinafter described accommodations, rents in excess of the maximum rents established by said Rent Regulations; that there is attached hereto and by reference made a part hereof, as though fully set out herein, a statement of the names of the persons overcharged, the period of occupancy of such persons, the maximum rent, the rent received from said persons and the amount of overcharges.

VII.

That said persons have failed to institute an ac-

tion under Section 205(e) of the Act, and more than thirty days have elapsed since the occurrence of the violations. [3]

VIII.

~~Plaintiff is informed and believes and therefore~~ alleges on such information and belief that defendant, as such landlord, within one year prior to the date of the filing of this action, in addition to the rent or rents demanded and received from tenants in this complaint alleged, demanded and received from other and different tenants rents in excess of the maximum rents permitted under said Rent Regulations; that the number and names of tenants and the amount of overcharges are facts peculiarly within the knowledge of said defendant **and plaintiff** is unable at this time to allege with certainty the amount of rents charged in excess of said maximum rents but that plaintiff upon ascertaining the amount or amounts thereof and the names of said tenants, will ask leave to amend this complaint and set forth the amount of said overcharges and the tenants from whom said overcharges were demanded and received. [Marginal Note: Stricken by the Court July 28, 1947. L.R.Y.]

Wherefore, the plaintiff demands:

(a) Judgment for the plaintiff to recover of the defendant treble the total amounts received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in the complaint, which were in excess of the maximum rents established by the Act and regulations issued thereunder, and further that;

(b) The defendant be ordered and directed to tender to all available persons named in the schedule attached hereto as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Act and regulations issued thereunder which were received by the defendant, his agents, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefor by said regulations, provided that refunds made by the defendant to such persons in compliance with the directions of the Court for rents received [4] within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding paragraph (a).

AUSTIN CLAPP,
WADIEH S. SHIBLEY,
ABE I. LEVY,

By /s/ SAMUEL B. STEINBACH,
Attorneys for Plaintiff. [5]

Housing accommodations located at 948 South Figueroa Street, City of Los Angeles, County of Los Angeles, State of California, and described as Belmont Apartments.

Unit	Name of Tenant	Legal Maximum Rent	Amount Paid	Period of Over- charge Commencing	Amount of Overcharge
205	Mary E. O'Shea.....	\$32.50 Mo.	\$10.00 Wk.	8/15/45, for 31 weeks	\$ 79.50
207	H. Herrmann	45.00 Mo.	15.00 Wk.	10/ 1/43, for 132 weeks	608.52
208	W. R. Campbell.....	7.00 Wk.	10.00 Wk.	4/10/45, for 49 weeks	147.00
210	Allen D. Bull.....	55.00 Mo.	25.00 Wk.	1/ 7/44, for 16 weeks	196.80
210	Allen D. Bull.....	55.00 Mo.	22.50 Wk.	4/28/44, for 99 weeks	970.20
216	M. Louisa Riley.....	55.00 Mo.	20.00 Wk.	10/24/45, for 13 weeks	94.90
217	J. M. Reardon.....	32.50 Mo.	10.00 Wk.	8/ 3/45, for 33 weeks	82.50
304	M. P. Anderson.....	35.00 Mo.	10.00 Wk.	8/24/45, for 30 weeks	55.00
305	Nettie G. Johnson, Adelyn Fredrickson....	35.00 Mo.	10.00 Wk.	12/ 2/43, for 120 weeks	218.40
312	Andrew P. M. Weir.....	35.00 Mo.	12.50 Wk.	10/28/44, for 72 weeks	318.24
315	Maxine Scarlett, Adelyn Frederickson.....	35.00 Mo.	10.00 Wk.	10/14/44, for 74 weeks	142.08
405	Catherine Carroll	35.00 Mo.	10.00 Wk.	3/27/45, for 51 weeks	97.93

Unit	Name of Tenant	Legal Maximum Rent	Amount Paid	Period of Over- charge Commencing	Amount of Overcharge
407	Fern Boltz	\$50.00 Mo.	\$18.00 Wk.	8/15/44, for 83 weeks	\$535.35
411	Nettie Simms, Janice Erickson.....	37.50 Mo.	12.50 Wk.	10/16/44, for 74 weeks	284.16
505	Norna G. Sessums.....	32.50 Mo.	40.00 Mo.	9/14/44, for 13 months	97.50
505	Mrs. J. Northledge.....	32.50 Mo.	10.00 Wk.	10/20/45, for 21 weeks	52.50
507	George F. Corbett.....	50.00 Mo.	20.00 Wk.	2/ 9/46, for 5 weeks	42.25
510	Eileen J. Meloy.....	50.00 Mo.	22.50 Wk.	2/15/44, for 83 weeks	908.85
511	H. H. Tubbs.....	35.00 Mo.	10.00 Wk.	9/16/44, for 78 weeks	149.76
605	Mariah K. Sutherland, Marie Knapp.....	35.00 Mo.	10.00 Wk.	6/30/44, for 80 weeks	153.60
615	J. B. Fordyce	37.50 Mo.	12.50 Wk.	9/28/44, for 77 weeks	295.68
Total.....					\$5,530.72

Statement of facts referred to and alleged in Paragraph VI of Plaintiff's Complaint herein.

[Endorsed]: Filed Mar. 27, 1947.

[Title of District Court and Cause.]

ANSWER

In answer to plaintiff's complaint, defendants John McCord and Florence McCord admit, deny and allege as follows:

I.

Deny generally and specifically each and every allegation contained in Paragraphs V, VI and VII of plaintiff's complaint.

And for a Further, Separate and Distinct Defense to Plaintiff's Complaint, Defendants Allege that:

I.

Plaintiff's complaint fails to state a claim against defendants upon which relief can be granted.

And for a Further, Separate and Distinct Defense to Plaintiff's [8] Complaint, Defendants Allege that:

I.

The claims set forth in plaintiff's complaint are barred by the provision of Section 925e Title 50 of the United States Code in that action thereon was not commenced within one (1) year from the date of the occurrence of the alleged violations.

And for a Further, Separate and Distinct Defense to Plaintiff's Complaint, Defendants Allege that:

I.

The violations by defendants, if any there were, of the Emergency Price Control Act of 1942, as

amended, or the Rent Regulations issued by the Administrator of the Office of Price Administration were neither wilful nor the result of failure to take practicable precautions against the commission of any such violations.

And for a Further, Separate and Distinct Defense to Plaintiff's Complaint, Defendants Allege that:

I.

Plaintiff is not authorized nor does he have the capacity to institute or prosecute the claims set forth in the plaintiff's complaint.

Wherefore, defendants pray that plaintiff take nothing by his action; that defendants be awarded their costs of suit, and such other relief as the court deems proper.

DESSER, RAU, CHRISTENSEN &
HOFFMAN,

By /s/ WM. CHRISTENSEN,
Attorneys for Defendants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 15, 1947. [9]

[Title of District Court and Cause.]

ORDER SUBSTITUTING PARTY
PLAINTIFF

The petition of Frank R. Creedon, Housing Expediter, to be substituted as plaintiff herein, having come on for hearing this 29th day of September, 1947, and it appearing to the Court that said petitioner is the duly appointed, qualified and acting Housing Expediter; that by virtue of Executive Order 9841 (12 F. R. 2645) issue by the President of the United States on April 23, 1947, said petitioner has been invested with all of the functions with respect to rent control of the Temporary Controls Administrator, Office of Temporary Controls, with full power and authority to continue and maintain in his name all civil proceedings heretofore instituted or maintained by the Temporary Controls Administrator; that there is substantial need for continuing and maintaining this action; and that defendants have been given due notice of this application:

Now, Therefore, It Is Hereby Ordered, that said petitioner in his [11] capacity as Housing Expediter, be and is hereby substituted as party plaintiff herein, in the place and stead of Philip B. Fleming, Temporary Controls Administrator of the Office of Temporary Controls.

Dated this 29th day of September, 1947.

/s/ LEON R. YANKWICH,
Judge United States District Court.

[Endorsed]: Filed Sept. 29, 1947.

[12]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS
PURSUANT TO RULE 36

Plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requests the defendants John McCord and Florence McCord, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That one, Tighe E. Woods, is Housing Expediter of the Office of the Housing Expediter, an agency of the United States Government.

2. That Tighe E. Woods, Housing Expediter, is the successor in office to Frank R. Creedon, Housing Expediter.

3. That Frank R. Creedon, Housing Expediter, was the successor in office to Philip B. Fleming, Administrator, Office of Temporary Controls, in so far as functions related to Federal Rent Control are concerned.

4. That by his appointment to the position of Housing Expediter, Tighe E. Woods, became invested with all the functions relating to Federal [13] Rent Control of litigation formerly vested in Philip B. Fleming, Administrator, Office of Temporary Controls.

5. That Paragraph One of plaintiff's complaint in the above captioned action states, among other things, that plaintiff brings this action pursuant to Section 205(a) to enforce compliance with Sec-

tion 4 of the Emergency Price Control Act of 1942, as amended.

6. That as of the date of the filing of the above captioned action, Philip B. Fleming was the duly acting and appointed Administrator of the Office of Temporary Control.

7. That as of the date of the filing of the above captioned action, Philip B. Fleming, Administrator, was authorized to maintain, commence and continue litigation brought pursuant to the provisions of the Emergency Price Control Act of 1942, as amended.

8. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the Office of Price Administration at Los Angeles reporting the rent on the maximum rent date for Unit No. 205 at 948 South Figueroa Street, Los Angeles, California, as \$32.50 per month.

9. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the Office of Price Administration at Los Angeles reporting the rent on the maximum rent date for Unit No. 207 at 948 South Figueroa Street, Los Angeles, as \$45.00 per month.

10. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a

registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 208 at 948 South Figueroa Street, Los Angeles, at \$7.00 per week.

11. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles [14] reporting the rent on the maximum rent date for Unit No. 210 at 948 South Figueroa Street, Los Angeles, at \$55.00 per month.

12. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 216 at 948 South Figueroa Street, Los Angeles, as \$55.00 per month.

13. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 217 at 948 South Figueroa Street, Los Angeles, as \$32.50.

14. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area

Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 305 at 948 South Figueroa Street, Los Angeles, as \$35.00 per month.

15. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 312 at 948 South Figueroa Street, Los Angeles, as \$35.00 per month.

16. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord, filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 405 at the above address as \$35.00.

17. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord, filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 315 at the above address as \$35.00 per month. [15]

18. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 407 at the above address as \$50.00 per month.

19. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 411 at the above address as \$37.50 per month.

20. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 505 at the above address as \$32.50 per month.

21. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 507 at the above address as \$50.00 per month.

22. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 510 at the above address as \$50.00 per month.

23. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent

Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 511 at the above address as \$35.00 per month.

24. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as agent of the defendant John McCord filed a registration [16] of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 605 at the above address as \$35.00 per month.

25. That on or about February 14, 1946 the defendant Florence McCord for and on behalf and as the agent of the defendant John McCord filed a registration of rental dwellings with the Area Rent Office of the OPA at Los Angeles reporting the rent on the maximum rent date for Unit No. 615 at the above address as \$37.50 per month.

26. That the above registrations of rental dwellings were filed by the defendant as a result of a suit for injunction to compel such filings brought against the defendants by the plaintiff's predecessor in office.

27. That the figures set forth in the statement attached to the complaint under the column heading "amount paid" and "Period of Overcharges commencing" are true, including periods of time set forth.

28. That the names of the tenants set forth in a statement attached to the complaint under the column heading "name of tenant" are correct.

29. That at all periods of time set forth in the table attached to the complaint the defendant John

McCord was the landlord of the premises described in the complaint.

30. That at all periods of time set forth in the table attached to the complaint the defendant Florence McCord was the landlord of the premises described in the complaint.

31. That as of the date of filing of this suit more than thirty days elapsed since the demand and receipt of the rent set forth in the statement attached to the complaint.

32. That at the date of the institution of this suit all of the tenants whose names are set forth in the statement attached to the complaint have failed to institute any action pursuant to Section 205(e) of the Emergency Price Control Act of 1942, as amended, pertaining to the demand and receipt of rent set forth in the statement attached to the complaint.

Dated Los Angeles, California, this 26th day of December, 1947.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ BENJAMIN CHAPMAN,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Dec. 29, 1947.

[17]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S REQUEST FOR
ADMISSIONS OF DECEMBER 26, 1947,
PURSUANT TO RULE 36

Defendants John McCord and Florence McCord in answer to plaintiff's request for admissions pursuant to Rule 36 of the Rules of Civil Procedure, make the following admissions, denials and allegations in answer to the matters set forth in plaintiff's request in the order therein set forth:

Paragraphs 1 through 25 inclusive are admitted by defendants.

26. Denied.

27. Admitted except as follows:

(1) That if in computing the periods of time set forth in the column headed "Period of Overcharges commencing," any of such periods extend beyond March 22, 1946, the same are specifically denied to any period extending beyond [19] March 22, 1946;

(2) That as to Units No. 207, 210, 304, 407, 510 and 511, they are neither admitted nor denied for the reason that the matters of fact therein set forth are not relevant, in that the claims allegedly arising in respect to those units have heretofore, and

prior to the filing of the complaint in this action, been adjudicated and disposed of.

Paragraphs 28 through 31 inclusive are admitted by defendants.

32. Specifically denied.

DESSER, RAU,
CHRISTENSEN & HOFFMAN,

By /s/ DAVID M. HOFFMAN,
Attorneys for Defendants.

(Affidavit of Service by Mail attached.)

(Duly Verified.)

[Endorsed]: Filed Jan. 9, 1948. [20]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
UNDER RULE 56

To: Defendants, John McCord and Florence McCord, and their Attorney, David M. Hoffman, Esq.

Pursuant to subsection (a) of Rule 56, the undersigned will move this Court in the Court room of the Honorable Leon R. Yankwich, in the Federal Building, 312 North Spring Street, Los Angeles, California, on February 9, 1948 at 10 o'clock a.m., or as soon thereafter as counsel can be heard:

(a) For summary judgment in favor of plaintiff's entire claim: or

(b) In the alternative, pursuant to subsection

(d) of Rule 56, if judgment is not rendered upon the whole case or for all the relief asked and a trial is found to be necessary, that the Court make an order specifying the facts that appear without substantial controversy and directing such further proceedings as are just.

This motion is based upon the following papers and documents on file:

- (a) The complaint. [23]
- (b) The answer.
- (c) Plaintiff's request for Admissions.
- (d) Defendants' answers to plaintiff's request for admissions.
- (e) This motion and notice of motion.
- (f) Proposed findings of fact pursuant to Local Rule 3(d)(2).
- (g) Memorandum of Points and authorities.

Dated at Los Angeles, California, this 26th day of January, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,

By /s/ CASSEL JACOBS,
Attorneys for Plaintiff. [24]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. Defendants' answer to plaintiff's request for admission shows that there is no fact in dispute and consequently plaintiff is entitled to a summary judgment.

Rule 56, Civil Rules of Procedure.

2. The "Chandler Defense" is an affirmative defense and the burden of proof to establish it is upon defendant.

Bowles v. Batson (W. Dist. S. Car. 1945)
61 F. Supp. 839, 844 Aff'd. 154 F. 2d 566.

Dated at Los Angeles, California, this 26th day of January, 1948.

Respectfully submitted:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,

By /s/ CASSEL JACOBS,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 26, 1948.

[25]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT

1. The defendants, John McCord and Florence McCord are the owners of the housing accommodations known as the Belmont Apartments, located at 948 South Figueroa Street, Los Angeles, California.

2. The defendants, John McCord and Florence McCord received respectively from the following tenants as rent for the following apartments in said apartment house, the following rents, for the following periods of time, during which the following legal maximum rents were respectively in effect under the Emergency Price Control Act of 1942, as amended, resulting in the following overcharges respectively: [27]

Unit	Name of Tenant	Legal Maximum Rent	Amount Paid	Period of Over- charge Commencing	Amount of Overcharge
205	Mary E. O'Shea.....	\$32.50 Mo.	\$10.00 Wk.	8/15/45, for 31 weeks	\$ 79.50
207	H. Herrmann	45.00 Mo.	15.00 Wk.	10/ 1/43, for 132 weeks	608.52
208	W. R. Campbell.....	7.00 Wk.	10.00 Wk.	4/10/45, for 49 weeks	147.00
210	Allen D. Bull.....	55.00 Mo.	25.00 Wk.	1/ 7/44, for 16 weeks	196.80
210	Allen D. Bull.....	55.00 Mo.	22.50 Wk.	4/28/44, for 99 weeks	970.20
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217	J. M. Reardon.....	32.50 Mo.	10.00 Wk.	8/ 3/45, for 33 weeks	82.50
304	M. P. Anderson.....	35.00 Mo.	10.00 Wk.	8/24/45, for 30 weeks	55.00
305	Nettie G. Johnson, Adelyn Fredrickson...	35.00 Mo.	10.00 Wk.	12/ 2/43, for 120 weeks	218.40
312	Andrew P. M. Weir.....	35.00 Mo.	12.50 Wk.	10/28/44, for 72 weeks	318.24
315	Maxine Scarlett, Adelyn Fredrickson.....	35.00 Mo.	10.00 Wk.	10/14/44, for 74 weeks	142.08
405	Catherine Carroll	35.00 Mo.	10.00 Wk.	3/27/45, for 51 weeks	97.93
407	Fern Boltz	50.00 Mo.	18.00 Wk.	8/15/44, for 83 weeks	535.35
411	Nettie Simms, Janice Erickson.....	37.50 Mo.	12.50 Wk.	10/16/44, for 74 weeks	284.16
505	Norma G. Sessums.....	32.50 Mo.	40.00 Mo.	9/14/44, for 13 months	97.50
505	Mrs. J. Northledge.....	32.50 Mo.	10.00 Wk.	10/20/45, for 21 weeks	52.50
507	George F. Corbett.....	50.00 Mo.	20.00 Wk.	2/ 9/46, for 5 weeks	42.25
510	Eileen J. Meloy.....	50.00 Mo.	22.50 Wk.	2/15/44, for 83 weeks	908.85
511	H. H. Tubbs.....	35.00 Mo.	10.00 Wk.	9/16/44, for 78 weeks	149.76
605	Mariah K. Sutherland, Marie Knapp.....	35.00 Mo.	10.00 Wk.	6/30/44, for 80 weeks	153.60
615	J. B. Fordyce	37.50 Mo.	12.50 Wk.	9/28/44, for 77 weeks	295.68

Total.....\$5,530.72

Dated at Los Angeles, California this .. day
of January, 1948.

Respectfully submitted:

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,

By /s/ CASSEL JACOBS,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 26, 1948.

[29]

[Title of District Court and Cause.]

DEFENDANTS' REQUEST FOR
ADMISSIONS PURSUANT
TO RULE 36

Defendants, pursuant to Rule 36 of the Federal Rules of Civil Procedure, request the plaintiff Frank R. Creedon, Housing Expediter, Office of the Housing Expediter, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That there were no rents charged by defendants in excess of the maximum rents established by the rent regulations for housing on any of the premises set forth in the complaint within a one (1) year period prior to the filing of the complaint by the plaintiff on March 27, 1947.

2. That on December 15, 1942, the defendants did file [30] with the Los Angeles Area Rent Office of the Office of Price Administration a registration as required by the Emergency Price Control Act of 1942, as amended, and the Rent Regulations for Hotels and Rooming Houses, which registration was on the forms and blanks furnished by the Office of Price Administration for hotels and rooming houses, and that said registration was accepted by said Area Rent Office.

3. That no rejection of said registration was made by the Los Angeles Area Rent Office of the Office of Price Administration until February 1946.

4. That the rents charged by defendants for the premises set forth in the complaint during the period from December 15, 1942, to February 1946, were in accordance with the rental rates set forth upon the registration forms filed with the Los Angeles Area Rent Office of the Office of Price Administration for hotels and rooming houses by the defendants on December 15, 1942.

5. That upon being notified of the rejection of the registration filed on December 15, 1942, by the defendants and upon demand by the Los Angeles Area Rent Office of the Office of Price Administration, the defendants did on or about the 14th day of February, 1946, file a new registration under the rent regulations for housing, which registration was accepted by said office on said date.

6. That the rents charged by the defendants from and after February 14, 1946, were in accordance with the registration forms filed with the Los

Angeles Area Rent Office of the Office of Price Administration for hotels and rooming houses by the defendants on February 14, 1946.

7. That in the schedule attached to the plaintiff's complaint and referred to in Paragraph VI therein, the alleged overcharges for the following named persons and units of occupancy have resulted in actions filed by said persons and have [31] all been adjusted, satisfied and dismissed:

- (a) No. 207—H. Herrmann.
- (b) No. 210—Allen D. Bull.
- (c) No. 304—M. P. Anderson.
- (d) No. 407—Fern Boltz.
- (e) No. 510—Eileen J. Meloy.
- (f) No. 511—H. H. Tubbs.

Dated at Los Angeles, California this 26th day of January, 1948.

DESSER, RAU,
CHRISTENSEN & HOFFMAN,

By /s/ DAVID M. HOFFMAN,
Attorneys for Defendants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 27, 1948.

[32]

[Title of District Court and Cause.]

AMENDMENT TO DEFENDANTS' REQUEST
FOR ADMISSIONS, PURSUANT TO RULE
36, FEDERAL RULES OF CIVIL PRO-
CEDURE

On January 26, 1948, defendants, pursuant to Rule 36 of the Federal Rules of Civil Procedure, requested plaintiff Frank R. Creedon to make certain admissions set forth therein in Paragraphs 1, 2, 3, 4, 5, 6 and 7. Since filing of said request, defendants have discovered that there was a typographical error in question 6 therein propounded, and, therefore, defendants at this time wish to amend and clarify question 6 and do, pursuant to Rule 36 as set forth, request the plaintiff to make the following additional admission for the purpose of this action only, subject to all pertinent objections to admissions which may be interposed at the trial:

6. That the rents charged by the defendants from and after February 14, 1946, were in accordance with [34] the registration forms filed on February 14, 1946, with and accepted by the Los Angeles Area Rent Office of the Office of Price Administration.

Dated: At Los Angeles, California, this 2nd day of February, 1948.

DESSER, RAU,

CHRISTENSEN & HOFFMAN,

By /s/ DAVID M. HOFFMAN,

Attorneys for Defendants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 3, 1948. [35]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto by their respective attorneys that the plaintiff's reply to defendants' request for admissions, heretofore served on defendants' attorneys but not filed in the office of the clerk of the court, may now be filed with the said chief clerk for the purpose of completing the record on appeal.

Dated September 10, 1948.

ABE I. LEVY,
FRANK L. HIRST,
STEPHEN D. MONAHAN,
RICHARD G. SOLOF,

By /s/ STEPHEN D. MONAHAN,
Attorneys for Plaintiff.

DESSER, RAU,
CHRISTENSEN & HOFFMAN,

By /s/ DAVID M. HOFFMAN,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 13, 1948. [37]

[Title of District Court and Cause.]

ORDER

Upon stipulation of the parties hereto and good cause appearing therefor,

It is ordered that the plaintiff's reply to defendants' request for admissions, heretofore served on

defendants' attorneys but not filed in the office of the clerk of this court, may now be filed by said clerk and be included in the record on appeal to the ninth circuit court of appeals.

Dated this 13th day of September, 1948.

/s/ LEON R. YANKWICH,
Judge United States District
Court.

[Endorsed]: Filed Sept. 13, 1948. [38]

[Title of District Court and Cause.]

REPLY TO DEFENDANTS' REQUEST FOR
ADMISSIONS

State of California,
County of Los Angeles—ss.

Plaintiff in answer to the defendants' request for admissions pursuant to Rule 36 of the Rules of Federal Procedure, makes the following admissions, denials and allegations:

1. Plaintiff cannot truthfully admit or deny the statement contained in Paragraph 1 inasmuch as the files and records of the plaintiff neither disclose that there were any rents charged by the defendants in excess of the maximum rent established by the Rent Regulation for Housing during the period set forth in said paragraph, nor do said files and records disclose that there were not any excessive rents charged by said defendants during said period.

2. Plaintiff cannot truthfully admit or deny the statements contained in Paragraph 2 as said statements contained more than one statement of fact. By way of partial admissions the plaintiff admits that on December 15, 1942, the [39] defendant, John McCord, did file with the Los Angeles Area Rent Office of the Office of Price Administration, three Registration forms designated as DH-D forms, said forms having been provided by said Office of Price Administration for use by landlords of accommodations subject to the Rent Regulation for Hotels and Rooming Houses in filing a statement of maximum rents, said forms having been furnished to all persons requesting same; said Registration forms filed by said John McCord permitted to be filed by Area Rent Office on or about said December 15, 1942.

3. Plaintiff denies the statement contained in Paragraph 3. Plaintiff states that for several months prior to July 31, 1945, efforts were made by the Office of Price Administration to obtain information from the defendant, John McCord, in order to make a determination on said defendant's request to bring his accommodations under the Rent Regulation for Hotels and Rooming Houses, and that on said July 31, 1945, a letter from said Office of Price Administration advised said defendant that his petition was denied and he was requested to contact the Compliance Section of said Area Rent Office for re-registration under the Housing Regulation. Said denial was incorporated in a formal order issued on August 9, 1945.

4. Plaintiff cannot truthfully admit the statements contained in Paragraph 4, or deny such statements. However, the plaintiff does state that insofar as records of the plaintiff disclose the statements in Paragraph 4 are correct. However, such records do not contain any data concerning the rents charged by the defendants prior to October 1, 1943, and therefore insofar as said period of time from December 15, 1942, to October 1, 1943, is concerned said statements in Paragraph 4 are denied.

5. Plaintiff cannot truthfully admit or deny the statements contained in Paragraph 5 since said paragraph contains more than one statement of fact. Plaintiff states that the defendant, John McCord, was notified of said rejection as early as July 31, 1945, and again on August 9, 1945. Plaintiff admits that pursuant to the demand of the Los Angeles Area Rent Office of the Office of Price Administration, the defendants did file on or about the 14th day of February, 1946, new registrations under the Rent Regulation for Housing. Plaintiff further [40] states that said registrations were filed on said date as the result of the institution of a Complaint for Injunction in the Superior Court of the State of California, in and for the County of Los Angeles, on December 13, 1945, said action being No. 508454; said action being for the purpose of requiring a registration under the Rent Regulation for Housing for the accommodations at 948 South Figueroa, Los Angeles, California. Plaintiff admits that said registrations were permitted to be filed by said Los Angeles Area Rent Office.

6. Plaintiff denies the statements contained in Paragraph 6.

7. Plaintiff denies the statements contained in Paragraph 7 with the exception of Sub-Division b, for the reason that the plaintiff is without sufficient information to admit the remaining portion of said paragraph. Plaintiff, however, will not require proof of satisfaction, adjustments, or dismissal as to the claims enumerated therein at the trial of this case if the defendant will furnish plaintiff informally sufficient evidence prior to the time of trial.

Dated this 9th day of February, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN.
FRANK L. HIRST,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 13, 1948. [41]

[Title of District Court and Cause.]

AFFIDAVIT OF FLORENCE McCORD IN
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Florence McCord, being first duly sworn deposes and says:

1. That she is one of the defendants in the above entitled action, and makes this affidavit for herself and for all the other defendants, and that she has

personal knowledge of all the matters herein, and defendant would testify to the matters stated herein.

2. That on December 15, 1942, the defendants did file with the Los Angeles Area Rent Office of the Office of Price Administration a registration as required by the Emergency Price Control Act of 1942, as amended, and the rent regulations for hotels and rooming houses, which registration was on the forms and [42] blanks furnished by the Office of Price Administration for hotels and rooming houses, and that said registration was accepted by said Area Rent Office.

3. That in applying to the said Area Rent Office, your affiant made full disclosure to the said office of the nature of the premises, which are the subject matter of this action, and of the various and several functions therein carried on and of the specific nature and extent of the use, occupancy and operation of the premises, and that it was after such disclosure and information to the said Area Rent Office that the said Office did give to your affiant the hotel and rooming house registration forms, which were completed and filed, as set forth in Paragraph 2 above.

4. That the said registration was received and accepted by the Los Angeles Area Rent Office of the Office of Price Administration, and no further action was taken thereon by said office until February, 1946, when said registration was rejected.

5. That the rents charged by the defendants for the premises set forth in the complaint during the period from December 15, 1942, to February 14, 1946, were in accordance with the rental rates set forth on the registration of December 15, 1942, filed

with the Los Angeles Area Rent Office of the Office of Price Administration for hotels and rooming houses.

6. That upon being notified of the rejection of the registration filed on December 15, 1942, and upon demand by the Los Angeles Area Rent Office of the Office of Price Administration, the defendants did, on or about the 14th day of February, 1946, file a new registration under the rent regulations for housing, which registration was accepted by the said office on said date.

7. That the rents charged by the defendants from and after February 14, 1946, were in accordance with the registration of February 14, 1946, filed with the Los Angeles Area Rent Office [43] of the Office of Price Administration for housing accommodations.

8. That there were no rents charged by the defendants in excess of the maximum rents established by the rent regulations for housing on any of the premises set forth in the complaint within one (1) year prior to the filing of the complaint by the plaintiff on March 27, 1947.

9. That in the schedules attached to the plaintiff's complaint, the plaintiff refers in Paragraph VI, to the alleged overcharges for the following named persons and units of occupancy, all of which have heretofore resulted in actions filed by said persons, and all of which have been adjusted, satisfied and dismissed:

A. No. 207—H. Herrmann

B. No. 210—Allen D. Bull

C. No. 304—N. P. Anderson

D. No. 407—Fern Boltz

E. No. 510—Eileen J. Meloy

F. No. 511—H. H. Tubbs.

10. That the registration filed by the defendants on December 15, 1942, was done in good faith and upon the belief that such registration was proper and accurate and the correct registration to file on the premises involved, and that the defendants did not intend to make any improper or illegal charges and that neither the filing of the said registration nor the collection of rents under said schedules therein were either willful or the result of the failure to take practical precautions against the commission of any violations of the Emergency Price Control Act of 1942, as amended, and the rent regulations issued thereunder.

11. That the defendants did everything humanly possible to comply with the provisions of the Emergency Price Control Act of 1942, as amended, and the rental regulations issued thereunder, and had no knowledge nor way of knowing that there might be a violation of the said Act until the rejection of the registration [44] by the said Area Rent Office on February 14, 1946.

/s/ FLORENCE McCORD,

Affiant.

Subscribed and sworn to before me this 2nd day of February, 1948.

(Seal) /s/ DOROTHY PEASLEY,

Notary Public in and for said County and State.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 3, 1948. [45]

[Title of District Court and Cause.]

STIPULATION AND AMENDMENT TO
DEFENDANTS' ANSWER

It is hereby stipulated between the parties, through their respective attorneys, that the Answer of the defendants be and is hereby amended and supplemented to add the following:

And for a further, separate and distinct defense to plaintiff's complaint, defendants allege that:

I.

That the plaintiff has been guilty of laches and unreasonable delay in bringing this action and in making the charges against the defendants in that in failing to proceed with due diligence and rejecting the application which was filed in good faith by the defendants on December 15, 1942, that by said failure to reject said registration until February 14, 1946, defendants have been greatly and irreparably injured and harmed.

And for a further, separate and distinct defense to [47] plaintiff's complaint, defendants allege that:

I.

That the plaintiff should be estopped from bringing and prosecuting this action and denied relief because the plaintiff has been guilty of great delay, and by failing to reject the registration filed by defendants on December 15, 1942 until the very late date of February 14, 1946, the plaintiff has lulled the defendants into a false sense of security and belief of the correctness of their registration, and

by his dilatory and unjustifiable delay, has caused the defendants great and irreparable harm and injury.

Upon filing said registration by the defendants, it became the duty of the Office of Housing Expediter to advise the defendants within a reasonable time that said registration was not acceptable, if it were not acceptable, and by having failed to reject said registration and so advise the defendants, the plaintiff should be estopped from now complaining of an alleged wrong which the defendants had no way of knowing that there might be a violation, and for which they had taken every practical precaution against the commission of any violation of the Emergency Price Control Act of 1942, as amended.

And for a further, separate and distinct defense to plaintiff's complaint, defendants allege that:

I.

The defendants were no longer the owners of the premises in question and had sold said premises on or about April 1, 1946, some eleven months prior to the filing of the cause of action by the plaintiff, and that at said time of the filing of the action by the plaintiff, the defendants were not and could not have been violating the law and, therefore, the Court could not, as a court of equity, have issued an injunction restraining the defendants from violating the law and, therefore, the Court in [48] this matter is without equitable jurisdiction.

Wherefore, defendants pray that plaintiff take

nothing by his action; that the defendants be awarded their costs of suit; and for other and further relief as the Court deems just.

It Is Stipulated and Agreed by and between the parties hereto that the foregoing Stipulation and Amendment to defendants' Answer be without prejudice to the plaintiff's right to move the Court to dismiss and/or strike Amendment to defendants' Answer at the time of trial without any notice whatsoever.

DESSER, RAU,
CHRISTENSEN & HOFFMAN,
By /s/ DAVID M. HOFFMAN,
Attorneys for Defendants.

Dated February 4, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,
By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

It is so ordered this February 6, 1948.

/s/ PAUL J. McCORMICK,
Judge, United States District Court.

[Endorsed]: Filed Feb. 6, 1948.

[49]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF FLORENCE McCORD IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

Florence McCord, being first duly sworn deposes and says:

12. That she and the other defendant, John McCord her husband, were the lessees of the premises in question known as the Belmont Apartment Hotel and operated said premises under said master lease from July 1, 1941, until April 1, 1946, at which later date the defendants' interest in said lease was sold through escrow and the purchasers of said interest in said lease took possession of the premises and continued to operate the same from April 1, 1946.

13. That at all times the defendant and her husband lived in the City of Ontario, California, and that while the defendants had a manager in the premises at the Belmont Apartment [50] Hotel in the City of Los Angeles, California and the said manager supposedly forwarded all mail and communications to the defendants, the defendants had learned since that there had been communications and correspondence which had not been received by them which was directed to them at the Belmont Apartment Hotel, and that not only was their delay caused by this situation, but that some of the matters referred to in the various pleadings and documents of the Office of Price Administration had not been received by them.

14. That the defendants thought it best, on the advice of counsel, for their protection and for the interest and welfare of all parties concerned that the inspection of their records and books be done under a court order, and it was for this reason that the defendants required the administrator to obtain a Subpoena Duces Tecum and that immediately upon the issuance of said Subpoena, the defendants made available all of their books and records to the administrator.

15. That the defendants have at all times sought to comply with the request of the administrator and notwithstanding there remaining justifiable issue of whether or not the premises in question were a hotel, defendants did re-register the premises as quickly as humanly possible in accordance with the procedures of the administrator. That it was not until February 28, 1946, that the administrator actually notified the defendants that the registration made on December 15, 1942, was void and of no effect, and this was done as an administrative procedure by the administrator and not a judicial determination by a court.

Dated February 9, 1948.

/s/ FLORENCE McCORD,

Affiant.

Subscribed and sworn to before me this 9th day of February, 1948.

(Seal) /s/ DOROTHY PEASLEY,

Notary Public in and for said County and State.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 10, 1948.

[51]

At a stated term, to wit: The February Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 10th day of February, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

For (1) hearing motion of plaintiff filed Jan. 26, 1948, for summary judgment, and (2) for trial; Frank L. Hirst, Esq., appearing as counsel for plaintiff; David M. Hoffman and Jack Lande, Esqs., appearing as counsel for defendants; defendants' trial memo., defendants' supplemental points and authorities in opposition to motion for summary judgment, and supplemental affidavit of F. McCord in opposition to motion are filed.

Court orders cause continued to 2 p.m. for further proceedings.

At 2 p.m. court reconvenes herein and all being present as before, Court orders that Woods, etc., is substituted as plaintiff herein.

Court orders motion for summary judgment denied.

Attorney Hirst makes a statement and Attorney Hoffman makes a statement.

Louis M. Noyes is called, sworn and testifies for plaintiff. Plaintiff's Exhibits 1, 2, 3 and 4 are admitted in evidence.

Florence McCord is called, sworn and testifies for plaintiff as adverse witness. Plaintiff rests. Florence McCord testifies further in her own behalf. Defendants rest. Attorneys Hirst and Lande argue to the Court.

Court finds in favor of defendants and against plaintiff, and directs counsel for defendants to prepare findings and judgment. [53]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 10th day of January, 1948, in the District Court of the United States, Southern District of California, Central Division, before the Honorable Leon R. Yankwich, Judge Presiding, sitting without a jury, Frank L. Hirst, Esq. appearing as attorney for plaintiff, and Messrs. Desser, Rau, Christensen & Hoffman, by Messrs. David M. Hoffman and Jack J. Lande, appearing for defendants, and the case having been dismissed against Doe I and Doe II, and oral and documentary evidence having been introduced on behalf of both parties, and the Court having considered the same and heard the arguments of counsel, and being fully advised, makes the following

FINDINGS OF FACT:

I.

The allegations contained in paragraphs I, II, III and IV of plaintiff's complaint are true. [54]

II.

The allegations contained in paragraph V of plaintiff's complaint are untrue, except that defendants were the lessees of the described property prior to April 1, 1946.

III.

The allegations contained in paragraph VI of plaintiff's complaint are untrue.

IV.

The allegations contained in paragraph VII of plaintiff's complaint are true, except as to H. Herrmann, Unit 207; Allen D. Bull, Unit 210; M. P. Anderson, Unit 304; Fern Boltz, Unit 407; Eileen J. Meloy, Unit 510; and H. H. Tubbs, Unit 511; and as to said persons and units, actions have been heretofore instituted and have been settled, compromised, dismissed and disposed of, and there is no further right of any kind whatever in said described and enumerated persons and units.

V.

The allegation contained in paragraph VIII of plaintiff's complaint has heretofore been dismissed by this Court.

VI.

The allegations and denials contained in paragraph I of defendants' answer of August 15, 1947, are true.

VII.

It is true that plaintiff's complaint fails to state a claim against defendants upon which relief can be granted.

VIII.

It is true that the action has been barred by the provisions of Section 925(e), Title 50 of the United States Code.

IX.

It is true that defendants' actions were neither willful, fraudulent nor the result of failure to take practical precautions. [55]

X.

It is true that plaintiff has been guilty of unreasonable delay in making the charges against defendants and proceeding thereon, and that defendants have been greatly and irreparably injured and harmed thereby.

XI.

It is true that plaintiff should be denied relief because of delay and great and irreparable injury to defendants.

XII.

It is true that defendants were not the owners of the premises subsequent to April 1, 1946; it is true that defendants were not violating the law, and the Court should not, as a court of chancery, issue an injunction against defendants; and it is further true that the Court should not exercise its equitable jurisdiction nor order restitution or any other relief.

XIII.

It is true that defendants are not guilty of fraud or concealment, and that plaintiff has been guilty of such delay as would cause it to be inequitable to make any other order against defendants.

Except as otherwise hereinabove specifically set forth, none of the allegations of the complaint are true and all of the allegations of the answer and amended supplemental answer are true.

CONCLUSIONS OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

I.

Plaintiff is not entitled to judgment against defendants, and shall take nothing by this action.

Dated April 30, 1948.

/s/ LEON R. YANKWICH,
Judge.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 30, 1948.

[56]

In the District Court of the United States for the
Southern District of California, Central Division

No. 6656-Y

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

JOHN McCORD and FLORENCE McCORD,
DOE I and DOE II,

Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on January 10, 1948, in the District Court of the United States for the Southern District of California, Central Division, before the Honorable Leon R. Yankwich, Judge Presiding, sitting without a jury, Frank L. Hirst, Esq. appearing as attorney for plaintiff, and Messrs. Desser, Rau, Christensen & Hoffman, by Messrs. David M. Hoffman and Jack J. Lande, appearing as attorneys for defendants, and evidence, both oral and documentary, having been introduced, and the cause submitted for decision, and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed that plaintiff shall take nothing by this action.

Dated April 30, 1948.

/s/ LEON R. YANKWICH,
Judge.

Judgment entered April 30, 1948. Docketed April 30, 1948. C. O. Book 50, Page 464. Edmund L. Smith, Clerk. By John A. Childress, Deputy.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 30, 1948. [58]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the entire final judgment entered in this action on the 30th day of April, 1948.

Dated this 25th day of June, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST
RICHARD G. SOLOF,
CASSEL JACOBS,
BENJAMIN CHAPMAN,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 28, 1948. [60]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

Appellant Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, hereby designates for inclusion in the record on appeal, the complete record of all the proceedings and evidence in the above action, including the entire reporter's transcript and all exhibits.

Dated this . . . day of August, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,
CASSEL JACOBS,
BENJAMIN CHAPMAN,

By /s/ FRANK L. HIRST,
Attorneys for Plaintiff and Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 3, 1948.

[62]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND
DOCKETING THE APPEAL

On application of the plaintiff and appellant herein, and good cause appearing therefor, It Is Hereby Ordered that the time for filing the record

on appeal and docketing the appeal in the above entitled action is extended to and including September 16, 1948.

Dated this 4th day of August, 1948.

/s/ BEN HARRISON,
Judge, United States District Court.

[Endorsed]: Filed Aug. 4, 1948. [64]

[Title of District Court and Cause.]

ORDER TO SEND UP ORIGINAL EXHIBITS

On motion of Stephen D. Monahan, Esq., attorney for plaintiff and appellant,

It Is Ordered that the original transcript of evidence and original exhibits in the above entitled cause be transmitted by the clerk of this court as a part of the record on appeal to the clerk of the ninth circuit court of appeals, at Los Angeles, California, to be safely kept by him and returned to this court upon final determination of this action in said appellate court.

Dated this 13th day of September, 1948.

/s/ LEON R. YANKWICH,
Judge, United States District Court.

[Endorsed]: Filed Sept. 13, 1948. [65]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65, inclusive, contain full, true and correct copies of Complaint for Treble Damages and Injunction; Answer; Order Substituting Party Plaintiff; Plaintiff's Request for Admissions Pursuant to Rule 36; Answer to Plaintiff's Request for Admissions of December 26, 1947, Pursuant to Rule 36; Motion for Summary Judgment Under Rule 56; Proposed Findings of Fact; Defendants' Request for Admissions Pursuant to Rule 36; Amendment to Defendants' Request for Admissions Pursuant to Rule 36; Stipulation; Order dated September 13, 1948; Reply to Defendants' Request for Admissions; Affidavit of Florence McCord in Opposition to Motion for Summary Judgment; Stipulation and Amendment to Defendants' Answer; Supplemental Affidavit of Florence McCord in Opposition to Motion for Summary Judgment; Minute Order Entered February 10, 1948; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Appellant's Designation of Record on Appeal and Order Extending Time to File Record and Docket Appeal

which, together with original plaintiff's Exhibits 1, 2, 3 and 4 and a copy of the reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 14th day of September, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12039. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. John McCord and Florence McCord, Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 20, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12039

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

JOHN McCORD, FLORENCE McCORD, DOE I
and DOE II,

Defendants.

STATEMENT OF POINTS ON APPEAL

The following are the Points upon which Appellant intends to rely upon the appeal:

1. The lower Court erred in holding that failure of the tenants to bring an action under Section 205(c) of the Emergency Price Control Act as amended (50 U.S.C. App. 901 et seq.) within the statute of limitations of one year therein provided barred recovery in an action brought by the Housing Expediter under Section 205(a) of the Act.

2. The lower Court erred in holding that the one-year statute of limitations provided for in Section 205(c) of the Act barred restitution in an action brought by the Housing Expediter under Section 205(a) of the Act.

3. The lower Court erred in holding that the Office of the Housing Expediter, an agency of the

United States Government, is subject to the doctrine of laches in an action for restitution brought under Section 205(a) of the Act.

4. The lower Court erred in finding that plaintiff was guilty of unreasonable delay in filing suit against defendants.

5. The lower Court erred in finding that defendants have been greatly and irreparably injured by plaintiff's delay in bringing suit.

6. The lower Court erred in holding that the change in possession of the property and the payment of income taxes by defendants constituted such a change of condition on the part of defendants as to prevent recovery by plaintiff in an action for restitution under Section 205(a) of the Act.

7. The lower Court erred in finding that the condition of defendants had so changed as to make it inequitable to order restoration of the rent overcharges.

8. The lower Court erred in finding that defendants had not collected rents in excess of the maximum rents as alleged in paragraph 6 of the complaint and schedule attached thereto.

9. The lower Court erred in failing to accept as true all facts admitted by defendants in their answer to plaintiff's request for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure.

10. The lower Court erred in finding that plaintiff's complaint failed to state a claim upon which relief could be granted.

/s/ ED DUPREE,
General Counsel.

/s/ HUGO V. PRUCHA,
Assistant General Counsel.

/s/ BENJAMIN I. SHULMAN,
Special Litigation Attorney.

Dated this 30th day of September, 1948.

PROOF OF SERVICE

A true copy of the foregoing Appellant's Statement of Points on Appeal was air mailed, special delivery on September 30, 1948 to defendants' attorneys, Desser, Rau, Christensen & Hoffman, 325 West Eighth Street, Los Angeles 14, California.

/s/ BENJAMIN I. SHULMAN,
Special Litigation Attorney.

[Endorsed]: Filed Oct. 2, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF
RECORD ON APPEAL

Pursuant to Subdivision 6 of Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, hereby designates for inclusion in the Record on Appeal, the complete record of all the proceedings and evidence in the above action, including the entire reporter's transcript and all exhibits.

/s/ ED DUPREE,
General Counsel.

/s/ HUGO V. PRUCHA,
Assistant General Counsel.

/s/ BENJAMIN I. SHULMAN,
Special Litigation Attorney.

Dated this 30th day of September, 1948.

PROOF OF SERVICE

A true copy of the foregoing Appellant's Designation of Record on Appeal was air mailed, special delivery on September 30, 1948 to defendants' attorneys, Desser, Rau, Christensen & Hoffman, 325 West Eighth Street, Los Angeles 14, California.

/s/ BENJAMIN I. SHULMAN,
Special Litigation Attorney.

[Endorsed]: Filed Oct. 2, 1948. Paul P. O'Brien,
Clerk.

In the District Court of the United States for the
Southern District of California, Central Division
Honorable Leon R. Yankwich, judge presiding.

No. 6656-Y

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

JOHN McCORD and FLORENCE McCORD,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

February 10, 1948

Appearances: For the Plaintiff: Frank L. Hirst,
Esq., Cassel Jacobe, Esq., Richard G. Solif, Esq.
For the Defendants: Desser, Rau, Christensen &
Hoffman, by Wm. Christensen, Esq., Jack Karen,
Esq., David M. Hoffman, Esq., Jack Lande, Esq.

Mr. Hirst: First I would like to dispose of the
motion which was set for yesterday; by stipulation
of counsel we continued that to the time of trial.
That was a motion for summary judgment.

The Court: I will deny the motion for summary
judgment. We will proceed with the trial of the
case. [2*]

* Page numbering appearing at foot of page of original
Certified Reporter's Transcript.

Mr. Hirst: Before we proceed I would like briefly to summarize the evidence which I think has already been disposed of by the pleadings in the action. As you will note, there has been a request for admissions filed by both parties to this action, and these requests are on file. In connection with the complaint itself, there is attached to the back of the complaint a schedule specifying the units in the action, the tenants, the amount paid, the period of overcharge, and the amount of overcharge.

The defendant by his admission has eliminated the necessity for much of the proof on the schedule attached and has admitted the various tenants' names were in fact the occupants of the rooms opposite their respective names, and paid the amount of rent indicated on the schedule, and were tenants during the period alleged with the exception that in no case did he admit occupants, I believe, beyond the 22nd day of March, 1946. [3]

Mr. Hoffman: I think that is correct.

Mr. Hirst: So in order to save the Court's time, the very purpose of the admission was to eliminate the necessity of bringing in the various tenants. The question here is one of the defendant, John McCord, having filed back in the very inception of the rent control, on December 15, 1942, a registration statement on the form provided for hotels and rooming houses, listing the various units of his establishment, and thereafter operating that establishment under that schedule until 1944.

We won't say definitely how the office became

aware of it, but there was a letter indicating Mr. McCord himself may have brought the matter before the attention of the agent, after which time, efforts were made to obtain registration under the regulation for housing distinguished from rent regulation for hotels and rooming houses.

Upon the determination that the establishment was in fact subject to housing regulations and not entitled to operate under the rent regulation for hotels and rooming houses, ultimately the defendant did file under the rent regulations for housing. These registrations for each of the units in the establishment were made on or about the 16th day of February, 1946. The defendant shortly thereafter sold the premises.

This action was not instituted until March 27, 1947, and [4] there is no question, your Honor, that by the very listing of the period covered by the overcharges, that the statute of limitations provided for in Section 205(e) of the Act have already run. The action itself is being prosecuted on the theory of the right of the Administrator to come before the Court in the case of overcharges and petition the Court to award restitution to the overcharged tenant. The issue as I see it, is the question of defense as raised as to the availability of laches, and estoppel, and so forth. We will offer proof by the representatives of the Office of the Housing Expediter relating to the records in the case, and the various filings in the matter. I don't believe there will be any other witnesses offered by the plaintiff.

Mr. Hoffman: Then general statement of counsel to the Court of the nature of this case is substantially correct, but I want to emphasize one or two points the defendant expects to prove.

First of all, if your Honor please, I believe the evidence will show that the defendant in this case, in accordance with the general instructions issued to all landlords who have property in the Los Angeles Defense Rental Area, that were required to register, I think, about the 15th of December, 1942 did, according to those instructions go down to the Area Rent Office. They told them what kind of establishment they had; that they had an establishment of 85 rooms, [5] and that they rendered services commonly rendered in hotels, such as desk and telephone service, and were given a form to register which they proceeded to do.

That registration was filed approximately the 15th of December, 1942. Pursuant to that registration and in accordance with the rents listed thereon, defendant collected rents not in any way in variance with that registration, but in accordance therewith, and continuing to do so during 1943, 1944 and 1945.

Now, along the line someone, some person or individual—I don't know how it started; we don't know how they decided that this establishment was not properly within the hotel registration—the evidence of which I am not even familiar with as to why it should not have been in a hotel rather than housing, but in any event it was improperly a hotel registration and should have been registered under a housing registration.

The Court: What did they call it?

Mr. Hoffman: What did they call this particular establishment?

The Court: Yes.

Mr. Hoffman: It was known as Belmont Apartment Hotel, at the time it was registered in 1942. In fact, it was known as that even before the OPA came into existence.

The Court: What kind of accommodation did they have? [6] Was there a bath connected with them?

Mr. Hoffman: I believe the evidence will show that they have rooms with baths and some kitchens, and furnished, and they were rented on a daily, weekly and monthly basis at the time that registration was filed. They could come in and rent on a daily, weekly, or monthly basis.

Now, if your Honor please, pursuant to the desires of the Office of Price Administrator, at that time the defendants re-registered, re-filed everything they have got on an entirely different basis, as required by the Office of Price Administration. They obtained a new registration which was filed the 16th day of February, 1946. And in accordance with this new registration the defendants now changed their rents to the entire tenants in accordance with this new registration. They maintained that until April 1st, 1946, at which time they ceased to be the owners and operators of the property, and have not been the owners and the operators of the property since April 1st, 1946. Now almost a year later, if the Court please, March 27, 1947,

a suit is instituted. This suit was under Section 205(e) and for an injunction, in the general form, and an allegation is contained, as the Court will recall in this complaint:

As plaintiff is informed and believes there were overcharges, which this court struck out on a motion when the matter was before your Honor, which leaves the treble damage [7] provision out. The court has stricken it out on the basis that it was an improper allegation but if the Court will review, as we have carefully reviewed, the periods of time set forth in the exhibit to the complaint, the Court will find as a matter of fact that none of the alleged overcharges therein came within a period within a year prior to the filing of this complaint. In other words, overcharges, if any, took place a year prior to March 27, 1947, and, therefore, as counsel very aptly points out, he cannot bring a treble damage action to recover.

They now take the stand that there was an erroneous registration, which they say was erroneous? We do not. In this case we do not because they simply followed instructions of the office. They are not asking for an injunction restraining the overcharges because there is nothing to restrain; they are not asking for treble damages. They are asking for one thing: They want this Court under what is claimed to be equity jurisdiction of the Court in this matter to order restitution to the tenants on these overcharges.

The Court: I have ruled on a lot of these matters. In the first place I have held that until the

Expediter is entitled to recover there is nothing out of which to make restitution. I have also held that restitution is also governed by the statute of limitations, because otherwise you would have a cause of action that was never outlawned. In equity, [8] where there is no limitation, we will consider the legal limitation as the equivalent of laches for which denial of the recovery will be granted. That is the law of California, which is still the federal law. If these are the facts of the case there is nothing to be tried, because an injunction cannot issue at the present time, because the person is no longer the owner.

Mr. Hirst: I want to call some authorities to your Honor's attention. I realize your Honor's position, as you have stated, but I would like to have time in which to cite some authorities.

The Court: I have seen your memorandum. Your memorandum does not cover this point at all.

Mr. Hirst: Yes, it does, so far as my consideration of the facts and the law. I refer to page 8 of the memorandum for trial which was filed just the last few days. *Woods v. Randolph* is the decision. I have not seen an exact copy of it, your Honor. I have been furnished with the summary of it. It is from the Circuit Court of the Fifth Circuit. It holds that restitution may be granted even though not requested by an indictment, or injunctive relief.

The Court: That is not the point. The point I am making is that restitution cannot be granted when the entire cause of action has lapsed.

Mr. Hirst: The cause of action is not based on Section [9] 205(e).

The Court: Then you have no cause of action.

Mr. Hirst: We are basing it on Section 205(a). In *Porter v. Warner Holding Co.*, the Supreme Court held that the court had equity jurisdiction in that case. The restitution was incident to injunctive relief, but the court held that the District Court had the authority to invoke equity jurisdiction for the purpose of making restitution on either of two bases: First, either as an equitable adjunct to an injunction decree or secondly, as an order necessary to enforce compliance with the Act.

We are asking the Court to restore the status quo here of the situation. He filed a registration form back in December, 1942 when the Court knows very well that millions of registrations were filed on or about that date and there was no opportunity to process them, and the statements of the landlord were filed in one registration and that did not establish the facts.

The Court: That is not the point. I understand that. I have read this case of *Blood v. Fleming*. That says nothing about the statute of limitations. The case turned on a summary judgment.

Mr. Hirst: In *Blood v. Fleming*—as I recall it, your Honor—I haven't got it in toto.

The Court: I have it here. [10]

Mr. Hirst: It definitely made the determination that the statute of limitations did not apply to a restitution suit. It stated that the only possible limitation was the question of laches, and the Cir-

cuit Court decision very definitely held that equitable relief was not one in which the statute of limitations was provided for as in Section 205(e).

The Court: For instance, in the case of *Kelly v. Bassett*, which was a famous case in which I happened to represent the plaintiff in that appeal, and it was before the higher courts, in that case the court held that even though two years and seven months had elapsed during which the plaintiff could sue the defendant because the defendant was a non-resident of California, therefore the statute of limitations did not apply. The statute of limitations was five years. Nevertheless she was barred by laches from asserting title.

Mr. Hirst: As I understand it, your Honor, laches is not necessarily tied up with the legal statute of limitations.

The Court: It all depends upon the particular case. Let us get the facts in and have them before us, and I will rule on the legal question as soon as the additional facts are put in.

Mr. Hirst: I will offer the official records, but I believe there is a stipulation going to be made as to some of that, and it may save some time. [11]

Mr. Hoffman: I might state to the Court I don't think there is very much at issue on the facts involved at all. I think we will have very little to put on in the way of testimony so far as the case is concerned.

The Court: All right.

Mr. Hoffman: There is one matter, your Honor, as long as the Court states he wants us to proceed:

In the list that is set forth as to overcharges which is attached to the complaint there are seven items, respecting seven tenants, to which I would like to call the Court's attention, and I think counsel will stipulate that that may be stricken upon the ground that there has been heretofore a disposition between the tenants involved and the landlord—a disposition of the claim which was listed thereon. Therefore the Administrator does not seek any recovery as to those items.

The court: Which are those?

Mr. Hoffman: 207, H. Herrmann, Allen D. Bull—there are two of them—210; M. P. Anderson, 304; Fern Boltz, unit 407; Eileen J. Meloy, 510, and H. H. Tubbs, unit 511.

The Court: How much does that leave, the amount claimed?

Mr. Hoffman: I figured it up. That leaves the amount—the total amount of that, I believe, is \$3,424.48 which subtracted from the amount prayed for leaves a balance of \$2106.24. Is that correct, counsel? I will so stipulate as to those. [12]

Mr. Hirst: As to those, on counsel's representation I will stipulate.

Mr. Hoffman: That is all.

The Court: Put on such oral evidence as you want to offer.

Mr. Hirst: I will call Mr. Noyes to the stand.

LOUIS M. NOYES,

a witness called by and on behalf of the plaintiff,
having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Louis M. Noyes.

Direct Examination

Mr. Hirst: Your Honor, counsel before trial this afternoon has stipulated with us that Mr. Noyes is qualified; he has also stipulated that the documents to which he is about to testify are the official records of the Office of Housing Expediter, and I don't believe there is any necessity to have his testimony at all, so far as identification of the records.

Mr. Hoffman: We will so stipulate.

Mr. Hirst: For the record, your Honor, I would like to identify, first of all, the sequence of events in this case briefly: I will identify for the record the registration forms which were filed by the landlord John McCord. I believe at this time Mr. Hoffman is interested—I understand the [13] important portions of the record are the three first documents and they list in sequence according to the room number the registered rents. As I previously stated, counsel has stipulated that these are the registrations which were filed. I will offer them for your Honor's perusal. I would like to have a stipulation, counsel, in the event they are necessary to be kept in the record that we can have a substitution of a copy at a later time and withdraw these.

Mr. Lande: So stipulated.

(Testimony of Louis M. Noyes.)

The Clerk: Plaintiff's Exhibit 1 in evidence.

The Court: All right.

Mr. Hirst: Your Honor, I first offer the original registrations filed, in the hotel registration form. I call your attention to the fact that in this filing there is a little box, within the boxes for the listings, and it states in the instructions at the top of the sheet that the landlord is to register an "X" mark in the box, the particular accommodation that is rented on the base date of March 1st, 1942, that is, whether it was offered on a daily, weekly or monthly basis. Ultimately, your Honor, the stipulation further provides that the defendant did file—Florence McCord, the wife filed on behalf of herself and husband John McCord a series of registrations, which I am presenting to the Clerk. There are 85 in all. They are filed on a rental registration form, using a form distinguished from the other form. They were filed [14] on or about the 16th day of February, 1946.

The Clerk: Are these admitted, your Honor?

The Court: Yes.

The Clerk: Plaintiff's Exhibit 2 in evidence.

The Court: They made one for each room?

Mr. Hirst: One for each apartment, yes.

The Court: That is very unusual, isn't it?

Mr. Hirst: The plaintiff's case is based on the housing regulation which requires separate registrations for each accommodation.

The Court: This is the first time I ever heard of that. It was done with hotels.

(Testimony of Louis M. Noyes.)

Mr. Hirst: I don't want to assume the ultimate fact of it being done with hotels, your Honor, because the evidence the plaintiff will produce will establish it definitely as an apartment. In other words, they filed a notice or listing of each of these rooms—I believe Mr. Lande checked that—of the 85 registrations there. Eighty of them are self contained units, which have a stove, refrigerator and all the necessary features of an apartment. These are registrations which according to the plaintiff, your Honor, should have been filed in December, 1942. They filed the wrong ones. They filed the wrong forms in the rent registrations and this is to correct their original mistake. That is not a part of the stipulation. [15]

The Court: Let us take the facts. This registration was filed and there is no overcharge contained in this complaint reflecting these?

Mr. Hirst: Except for a very few instances, for a period of three weeks or a month after these registrations were filed. There is no assertion of a violation.

Mr. Hoffman: The Court wants to know if there was any violation in accordance with these registrations. You will concede there are none?

Mr. Hirst: I can't concede that because our case is based upon these being the registrations.

The Court: You have retrojected into the past, and called them a base registration?

Mr. Hirst: Yes. The next file we wish to offer, if your Honor please, is a schedule. This is the file

(Testimony of Louis M. Noyes.)

of the Area Rent Office, your Honor, leading up to the file instigating the order of date August 9, 1945 in which the Rent Director refused permission to Mr. McCord to come in the hotel registration, and counsel has stipulated this is the official record of the office of the Housing Expediter and that the records may be introduced. However, he has not stipulated that all of the letters referred to have been received by the defendants but he will stipulate they were sent out.

Mr. Lande: Yes. [16]

The Court: They may be received.

The Clerk: Plaintiff's Exhibit 3 in evidence.

Mr. Hirst: There is one other document I wish to call to your attention, your Honor. It is part of the permanent file. Counsel has produced it. He will stipulate this letter was sent to the defendant John McCord. I presume he is not stipulating it was received. Your Honor, I have placed a yellow sheet of paper opposite the pertinent document.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(Testimony of Louis M. Noyes.)

PLAINTIFF'S EXHIBIT No. 4

Los Angeles Defense Rental Area
1037 South Broadway
Los Angeles 15, California

8R:LA:JRC(c)

September 5, 1945

Mr. John McCord,
Hotel Ontario,
Ontario, California.

Compliance Case No. 130081

Belmont Apartment Hotel
948 South Figueroa Street, Los Angeles

Dear Sir:

Confirming our telephone conversation today, we are requesting that you or your representative call at this office within seven days from the date of this letter for the purpose of re-registering the subject housing accommodations, known as the Belmont Apartment Hotel, under the Housing Regulations, the property at this time being improperly registered under the Hotel Regulations.

Further confirming our telephone conversation of this date, it is our understanding that you are on this date instructing your manager, Mrs. Ross, to permit the tenants Mr. and Mrs. William Everett, to regain possession of their apartment from which they were wrongfully excluded there having been no compliance with the Housing Regulations by you or your manager in the evicting of said tenants.

(Testimony of Louis M. Noyes.)

Your failure to call at this office within the afore-said time, and to properly register the premises, will result in the matter being referred to the Enforcement Division for immediate legal action.

Very truly yours,

JAMES R. CARNES,
District Rent Compliance Attorney

cc: Mr. McCord at the above address.

Mr. Hirst: Your Honor, that letter I have just referred to, I wish to call your Honor's attention specifically to it being a letter written by Mr. McCord, and I believe that is the inception of the proceedings by the Rent Director. That is the first indication he had that there may have been improper filing. That file is put together, you will notice, in chronological sequence, the last document received being on the top.

The Court: All right.

Mr. Hirst: That is all the evidence I wish to offer.

Mr. Hoffman: May I ask the witness one or two questions?

The Court: Yes. [17]

Cross Examination

By Mr. Hoffman:

Q. Mr. Noyes, you examined this file that has been introduced, and you have had custody and control over it? A. Yes, I have.

(Testimony of Louis M. Noyes.)

Q. So far as your office shows, Mr. Noyes, don't your records show any rates collected, or any rents charged by the defendants—do your records show that the rents collected by the defendants were either in accordance with the original registration or were in accordance with the new registration? Are you able to answer?

A. The question is not quite clear. Do you mean the amount collected by the landlord, under the complaint, are equal to the amounts set forth by the landlord in the various registrations, either the first or second?

Q. That is correct.

A. I did not check these amounts.

Q. You don't know whether they conform or not?

A. No, I don't.

Q. Did you examine your records concerning whether or not they were correct amounts collected by the defendants—that they were in accordance with either one of these two registrations?

A. Yes.

Q. Were they not? [18]

A. They were in accordance with the housing regulation.

Q. Were they in accordance with the first registration, if they weren't in accordance with the housing regulation?

A. I did not check the amounts.

Q. You made only a check against the housing?

A. I personally made only a check against the housing, since it was filed.

(Testimony of Louis M. Noyes.)

Q. So you don't know whether they were in conformity with the original? A. No, I don't.

Q. Do your records show whether any of the rents collected prior to March 27, 1947 were not in accordance with the original registration?

A. They don't show anything one way or the other as to any subsequent date to this action.

Q. I am talking about one year prior to the filing of this, March 27, 1947, do you know of any amounts that were not in accordance with the second registration? A. No, I don't.

Mr. Hoffman: That is all.

Mr. Hirst: I am going to call Mrs. McCord. Let the record show, your Honor, that plaintiff is calling Mrs. McCord as an adverse witness under the Federal Rules of Civil Procedure. [19]

FLORENCE McCORD,

a witness called by and on behalf of the plaintiff under the Federal Rules of Civil Procedure, having been first duly sworn, testified as follows:

The Clerk: Your name, please?

The Witness: Florence McCord.

Direct Examination

By Mr. Hirst:

Q. Mrs. McCord, during all the period beginning with the date let us say January 1st, 1942, to April 1st, 1946, were you and your husband the operators of the Belmont Apartment Hotel, as

(Testimony of Florence McCord.)

I recall it at 948 South Figueroa Street, Los Angeles?

A. We owned the lease, but we had a manager after September 1, 1943.

Q. You operated the apartment hotel, though, through the agency of a manager. Is that right?

A. Yes, sir.

Q. The registrations which have been introduced into evidence as Plaintiff's Exhibit 2, which I will now show you, I will ask you to briefly glance through those and state whether or not those were registrations you filed on or about the date stamped at the top of each of those registrations. I should say the reverse side is postmark dated February 18, 1946. [20]

A. That's right, I filed these.

Q. The matter contained in the spaces which have been filled in, was that done in your handwriting, Mrs. McCord?

A. Yes, sir.

Q. Where did you obtain the data from which that information was obtained? Where did you get the data for it?

A. I got it from the apartment hotel.

Q. From the hotel records? A. Yes.

Q. And the amount indicated on the space provided for it, where it states that the rent charged on the maximum rent date was so much, as I understand, the amount stated there was taken from the hotel record?

A. Yes.

Q. That was of March 1st, 1942, is that correct?

A. Yes.

(Testimony of Florence McCord.)

Q. Calling your attention to the paper on the right-hand side of these registrations, where you have checked the numerous services and equipment, that information was also gathered from your personal knowledge, or from the records of the hotel, is that right? A. Both.

Q. Is it not true that approximately 80 of these units in the Belmont Apartment Hotel on March 1st, 1942 were self contained units, that is, had their own kitchen facilities? [21]

A. 79, to be exact.

Mr. Hirst: That is all.

Cross Examination

By Mr. Hoffman:

Q. Mrs. McCord, what type of services did you have at this establishment in 1942, when it was originally registered?

A. If we sold a room or apartment on the transient basis, they received the same as you do at a hotel, the daily maid service, clean towels, toilet tissue, and if we sold it on a weekly basis they still received—if we knew they were going to be there one week or two weeks they still received daily service, and if they were there as a permanent guest they received maid service once every two weeks, but we gave them continuous telephone service. It was operated like a hotel.

Q. It had 85 rooms?

A. It had 150 rooms. There were 79 units, they call them in California, and 6 hotel rooms.

(Testimony of Florence McCord.)

The Court: By hotel rooms, they are rooms which do not have the kitchen accommodations?

The Witness: No.

The Court: A bath goes with every unit?

The Witness: Yes, a bath goes with every unit and with every room. [22]

Q. By Mr. Hoffman: Mrs. McCord, when the original registration was made by your husband John McCord, Plaintiff's Exhibit 1, showing certain figures of rates charged for these various rooms, were those taken from your hotel records?

A. Yes, they were.

Q. And did you rent rooms at the time this registration was filed, on the daily, weekly and monthly basis?

A. Always.

Q. Depending upon what?

A. Upon the desire of the guest.

Q. Were you with Mr. McCord when Plaintiff's Exhibit No. 1 was originally prepared?

A. Yes.

Q. Where did you obtain these papers?

A. Down on South Broadway; 1031 South Broadway. We went there and they sent us across the street and we were given this file.

Q. Did you talk to someone there?

A. We talked to a lady. She asked us what kind of service we gave, and what we had. She gave us that file.

Q. In other words, she gave you each one of these papers and asked you to fill them out and send them in?

(Testimony of Florence McCord.)

A. She told us what to do with them, and we filled them out. [23]

Q. That was the 15th of December?

A. The 15th of December.

Q. Thereafter, and until you filed these other papers which you were shown, on February 16, 1946, did you charge the rates shown on these papers, to your tenants?

A. Yes, we charged those, and no more, up until we re-filed.

Q. Then did you change your rates when you refiled?

A. Yes, we did right away; we notified the guests that on their next rental date their rent would be so and so.

Q. Were you told, or were you under the impression that those were the rates that you could collect? A. Certainly.

Q. Until you were notified to the contrary by the Office of Administration?

A. That's right.

Q. Then you changed them? A. Yes.

Q. Then you changed your rate?

A. We changed the rate.

Q. Can you tell the Court, so as to make it clear, this: The rates which you listed on the original papers, that is, as of December 15, 1942, were based upon what rates, or what period of time?

A. February, 1942. [24]

Q. You mean the entire month of February?

A. The highest rent collected in the month of February.

(Testimony of Florence McCord.)

Q. The rates which you set forth in these individual papers which you filed February 16, 1942, were based upon when? A. March.

Q. When?

A. March, 1942; the highest rent collected in March, 1942.

Q. Do you mean the entire month?

A. No, the highest rent collected March the 1st, 1942, yes.

Q. So these are only on a one day basis?

A. Yes.

Q. These are on the entire month basis?

A. Yes.

Q. That is the difference between the two rates shown on it? A. That is right.

Mr. Hoffman: No further questions at this time.

Redirect Examination

By Mr. Hirst:

Q. Mrs. McCord, you stated that you were with your husband when the original registration was filed at the [25] Broadway office?

A. Yes, sir.

Q. You recall there were a number of clerks? That is the triangular building at Tenth and Broadway? A. Yes.

Q. You talked to one of the clerks there?

A. My husband did the talking but I was right there with him.

Q. Did you state to the clerk that you operated a hotel?

A. We told her that it was an apartment hotel;

(Testimony of Florence McCord.)

we had both. She said, "What do you sell mostly?" We said, "We prefer to sell transiently, and we rent as a hotel," so she said, "We will have a hotel filing."

Q. You told her what your preference was?

A. No. We did not ask her for the forms at all.

Q. Did you tell her all of your rent during the month of February had been predominantly on a permanent basis?

A. No, we did not tell her that, because we did not know it.

Q. Did you help your husband at all in preparing this original registration? A. Certainly.

Q. The first three pages is all I will call your attention to, Mrs. McCord. These are the listings in the original registration. I call your attention to the notation [26] under Section B where it says "If the room was actually at the rent reported and not merely offered for rent, indicate by placing an 'X' in the box after the amount." I call your attention to the numerous entries after each of the rooms, and the rents apportioned for each of the rooms, and ask you to state, is it not true, based either on your personal recollection, or refreshing your memory from that record, that the predominant number of apartments there were actually rented by the month during the month of February, 1942? I also call your attention to the reverse side of these forms, Mrs. Cord, where the listing is also given.

A. There were a lot of them rented at the rate of \$2 a day, but there weren't as many.

(Testimony of Florence McCord.)

Q. There were only a few, were there not, rented on a daily basis during that time?

A. During that time.

Q. Most of them were on a monthly basis but a few on a weekly basis?

A. Quite a few of them were weekly.

The Court: Where is this located?

The Witness: At 948 South Figueroa, right across the street from the Figueroa Hotel.

Q. (By Mr. Hirst): How many two-room apartments do you have there?

A. Are you speaking of doubles? [27]

Q. Single apartments.

A. There are 12 doubles and 12 from 79 is 57.

Q. 57 single apartments?

A. Yes, 57, 12 and 6.

Q. The balance are single rooms or bachelor apartments? A. Yes, 6.

Q. In each of these facilities, that is, the single apartments and the double apartments, there are kitchen facilities and bathroom facilities?

A. Yes.

Q. They are actually self contained units, are they not? A. Yes.

Mr. Hirst: That is all.

Recross Examination

By Mr. Hoffman:

Q. I want to ask the witness a question: Mrs. McCord, your husband who filed these is not here today, is he? A. No, sir, he is ill.

(Testimony of Florence McCord.)

Q. How long has he been ill?

A. He has been ill for about three years.

The Court: Is he bedfast?

The Witness: He is in and out of the hospital. He has been in the hospital five times the last three years. [28]

Q. (By Mr. Hoffman): You have been handling the matter yourself? A. Yes.

Mr. Hoffman: I have no further question at this time, your Honor.

Mr. Hirst: That will be all, your Honor. The plaintiff rests at this point.

Mr. Hoffman: We have a motion at this time.

The Court: You might as well put all your additional facts in. Any ground that you have for judgment that you might have for a motion is just as good at the conclusion of the case, and saves a lot of trouble, since the Circuit Court has said that we have to make findings on a motion for a non-suit.

Mr. Hoffman: I will simply call Mrs. McCord for my witness for a couple of additional questions.

MRS. FLORENCE McCORD

one of the defendants, recalled as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Hoffman:

Q. Mrs. McCord, where do you and your husband now reside? [29]

(Testimony of Florence McCord.)

A. At Ontario, California.

Q. How long have you resided at Ontario, California? A. Since March 1st, 1945.

Q. Prior to that time where did you and your husband reside?

A. We operated the Allesandro Hotel at Hemet, California.

Q. During the years after this registration on December 15, 1942, to 1945 were you residing at Hemet?

A. We went to Hemet on October 1st, 1944.

Q. Prior to that time where were you and your husband residing?

A. At the Belmont Apartments.

Q. You were there up until when?

A. September 1st, 1944.

Q. From that time on you operated this establishment through a management, is that correct?

A. Yes.

Q. If any mail was sent to you at the Belmont, it would have to be forwarded to where you were?

A. That's right.

Q. Mrs. McCord, with respect to the various tenants that you had in the Belmont Apartment Hotel during the years 1943 and 1944 and 1945, during those three years, what were the rates which you charged your tenants, that is, with [30] respect to these registrations?

A. We charged exactly what was on the register.

Q. That was the one you originally filed?

A. That's right.

(Testimony of Florence McCord.)

Q. After you changed the registration—that was, I understand, February 16, 1946?

A. That's when we re-registered.

Q. Did you then change the rates to your tenants as of March 1st and of the next rental date?

A. Yes.

Q. In accordance with that registration?

A. The housing registration.

Q. Are you and your husband now operating the Belmont? A. No, we aren't.

Q. Do you still have it?

A. No, we don't; we sold it.

Q. When did you sell it?

A. April 1st, 1946.

Q. You have not had anything to do with it since that date, is that correct?

A. No, that's right: I haven't even been in the door.

Q. Do you recall being asked by the Office of Price Administration to change your registration?

A. Yes.

Q. On the basis that you were not properly considered [31] as a hotel? A. Yes.

Q. And did you change your registration in accordance with their desire?

A. I sent it in to the office and they did not accept it. I sent it in again and they did not accept it. When they accepted it the second time I changed the rate.

Q. Mrs. McCord, did you or your husband have any idea at all, or were you told by anyone at the

(Testimony of Florence McCord.)

time that you registered on the original form, that that registration was not correct?

A. Why, no.

Q. Did you assume that it was?

A. Why, of course. We operated that way for three years or longer.

Mr. Hoffman: That is all.

Cross Examination

By Mr. Hirst:

Q. Do you know, Mrs. McCord, whether or not the Office of Price Administration was notified by you or your husband following your moving from the Belmont itself? You stated you moved from there September, 1944?

A. 1943, I should have said.

Q. Do you know whether your husband notified the office or you yourself did? [32]

A. No, I didn't. I don't know if he did or not. I did not think it was necessary.

Q. I call your attention, Mrs. McCord, to the letter here contained in Plaintiff's Exhibit 3 which is signed "John McCord," and addressed to the Los Angeles Defense Rental Area. Is that your husband's signature? A. Yes.

Q. I call your attention to a letter-head, which at the top of the sheet indicates the Belmont Apartments, 948 South Figueroa. Is that the letter-head used by your husband?

A. That stationery was there when we took it over.

Q. You took the stationery then with you when

(Testimony of Florence McCord.)

you moved from the Belmont? A. No.

Q. You used it to write letters?

A. This stationery belonged to the property. They had it prior to us. We used it.

Q. You will notice that the address stated by your husband on the letter-head is 948 South Figueroa Street? A. Yes.

Q. He wrote that letter dated July 12, 1944?

A. Yes.

Q. Were you aware that your husband sent the letter at the time? [33]

A. No, I didn't even read it, what it said.

Q. I will ask you to read it and see if that refreshes your memory? Does it refresh your memory? A. I saw that letter before.

Q. You weren't present when your husband wrote it? A. No.

Q. Do you know if he received any communications following the sending of this letter to the office? A. No, I don't.

Q. I call your attention now to the various letters which are in the file, which are all subsequent to the receipt of this letter of July 12, 1944, and call your attention to the letters of December 6, 1944, January 2nd, 1945, February 16, 1945, March 13, 1945, May 10, 1945, and May 26, 1945, with the final letter signed by Mr. John McCord June 5, 1945. Did you receive the original of those letters?

A. I have not read any of them yet. In October, 1946, I am quite sure it was in October, that Mr. Percy Hayes from the Hotel Association and my-

(Testimony of Florence McCord.)

self went to the office of the Price Administration, because I was aware of the fact that they wanted us to re-register.

Q. October, 1946?

The Court: 1945.

A. I think it was 1945; that's right.

Q. (By Mr. Hirst): You say in October, 1945, a [34] representative from the Hotel Association and you went to the agency? A. Yes.

Q. What took place?

A. Well, I discussed with her—it was a lady; I don't recall the name.

Q. Was it Miss Lushu?

A. Yes. She said we would re-register as a housing. So then I did re-register. I don't remember the date but I remember they refused that; then I again registered and they accepted that one. That was February 16th.

Q. You say you again re-registered this, a final registration?

A. There was something wrong with the one, or something.

Q. That was the reason that you were not accepted the first time. Is that true?

A. Yes.

Q. Did you read these letters I referred you to?

A. I am reading them. I don't remember about this. They kept asking for September, October and November.

Q. They kept asking you for figures of your operation for those three months?

(Testimony of Florence McCord.)

A. I don't recall receiving all these letters. This was in 1945. That was when I was taking care of it. [35]

Q. I call your attention to the last letter, that I called to your attention previously, of May 26, 1945, to which there was apparently a reply by John McCord. Is that the letter your husband wrote?

A. That is his signature.

Q. Would you read the letter?

A. "Referring to yours of May 26th, 1945, sorry to advise that, inadvertently,——"

Q. I don't mean out loud.

The Court: Read it to yourself.

A. That's his signature.

Q. (By Mr. Hirst): Were you present when he wrote that letter?

A. I can't understand it.

Q. I call your attention to the subsequent letter of July 31, 1945, addressed to Mr. John McCord. Will you read that too? Did you ever see the original of that letter? A. No.

Q. Do you know whether or not your husband received it?

A. No, I couldn't say whether he did or whether he didn't; I don't know.

Q. That is true as to all of the rest of the letters? A. That is right.

Q. In any event, you haven't seen that before, according to your best recollection? [36]

A. Often he went into the Belmont without me.

(Testimony of Florence McCord.)

She would give him his mail. Sometimes I would go in and I would get the mail.

Q. As finally recorded, will you read to yourself the order denying the petition, dated August 9, 1945, and state whether or not you ever saw that before?

A. I did not know there was a petition until I read this. I did not even know that he asked for it.

Q. You did not know that he asked for permission to come in under the regulation? A. No.

Q. You don't know whether your husband received that or not?

A. I did not know that he even asked for it.

Q. You don't know whether he may have received it at the Belmont, going in and picking it up, as you say he sometimes did?

A. Sometimes he would pick them up, and sometimes they sent them to him.

Q. You did receive communications, did you not, which were addressed to Mr. McCord at the address of 948 South Figueroa, after you moved from there? A. Yes.

Q. They were forwarded to you? A. Yes.

Q. Who were your managers during 1945 and the first part of 1946, before you sold the hotel?

A. Mrs. Roberts was the first one, and then Mrs. Ross.

Q. Do you recognize Mrs. Ross' handwriting?

A. I think so.

The Court: Is there anything further, gentlemen? Let me look at the letters that you men-

tioned. I don't think my attention was called to that particular letter.

Mr. Hirst: The letter that her husband wrote, your Honor?

The Court: Yes. Yes, I saw that.

Mr. Hirst: I believe that is all.

The Court: Any further testimony?

Mr. Hoffman: No further testimony.

(Short recess.)

The Court: All right, gentlemen, I will hear any comments you want to make.

Mr. Hirst: Your Honor, I would like to preface what I say by calling your attention to the situation back in November and December 1942. There was the situation there when the rent control first went into effect, where anybody who had any property was scurrying to get in within the requirements of the law, and for that purpose clerks were hired by the government to pass these out to those requesting them. I don't think the court should give consideration to that [38] fact because, after all, there is a regulation in force, and the defendant could have sought out the information as to whether they had acted properly or not. The registration is not the determining factor, so far as establishing the maximum rent is concerned. That is only prima facie evidence of what the maximum rent was.

She has admitted by her subsequent registration that on March 1st, 1942, which was the freeze date for the rent control, the rents charged were in ac-

cordance with the registration, on the second registration which occurred February 16, 1942. Those were the ones that should have been filed originally. The government should not be penalized because the landlord has filed on the wrong form. It is the same as the income tax. It may be unfortunate that it took place. I won't say that they did it deliberately. That is not the point in issue. The fact is that they filed on the wrong form. The fact further is that on March 1, 1942, the situation so far as the operation of that establishment was concerned, it was predominantly operated as an apartment house.

In March 1942 there were 63 complete tenancies there of at least two rooms, some three rooms, and some double apartments; there were seven weekly tenants and there were seven daily tenants there. Under the definition of the regulation there is no question but what that establishment was at that time an apartment and was thereby subject to rent regulations [39] for housing, which required the proper filing of the registration form, although the government had no knowledge of the true facts other than the statement of the landlord that it was a hotel. They permitted that registration to be filed for three years, and that should not mitigate against the government because they are acting on information submitted by the landlord.

Now commencing in July 1944, John McCord—the reason why I don't know—sends a letter to the agency and says he has been operating this for some time and will continue to operate it as a hotel prop-

erty. There is some question in his mind. They ask him to furnish information and fill out certain forms to establish that it is either a hotel or an apartment.

Several months pass. Eight or nine months go by and in July 1945 the landlord is notified by letter—that you are definitely under the rent regulation for housing and you must come in and re-register. That is promulgated in the order issued the 9th day of August 1945, which denied his petition. Apparently the office treated the letter written by Mr. McCord as a petition.

Some time passes, and the defendants did not make the registration until February 16, 1946, which was five months beyond that date, and this states that they were notified to come in by the compliance department and file a registration, [40] and they were told to do so by the enforcement department, and suit was filed, to enforce compliance with the regulation.

The defendants did not operate for only a short time after the regulations were filed in April 1st, 1946. Then they went out of business. Your Honor, there certainly is no benefit that the defendants should derive from the passing of all that period of notification and the first indication that they were not under the proper regulation. They cannot claim the benefit of that delay themselves. The delay should be, if anything, in favor of the government. They were not entitled to come under the regulation for hotels. They were apparently satisfied that they had filed improperly, and after some

more delay did file under the proper regulation. It does not take away the fact that there had been overcharges, your Honor, for a period of two or three years.

Your Honor knows well that before the proper determination is made by the agency, the agency is in no position to go into court and seek treble damages. They have to await the final action by the landlord and when the registration is filed then it becomes the basis upon which the Office of the Housing Expediter can file an information for a treble damage claim. The information is peculiarly with the landlord.

It is the plaintiff's contention that if there is any doubt in your mind that this property was subject to the rent regulations for housing as differentiated from the rent regulations [41] for hotels, you can find it by referring to the definition in the regulation itself that is cited in the brief which has been filed, your Honor. The rent regulation involved for housing, with specific exceptions, is provided for in Section (b)(3) which exempts from said regulation rooms in hotels, rooming houses and motor courts. It also anticipates a situation where the Director might see fit to grant its consent to the operator of a hotel to bring itself within the operation of the rent registration for the hotel. Here there is no such consent given.

Referring to the status of this establishment on March 13, 1942, it was predominantly for permanent guests. There were 63 monthly tenants there. I don't see how counsel has any doubt about it. The

very fact that the defendant had filed a second registration is an admission on his part that they were in there and they have very definitely established, to my satisfaction anyway, that they were under the regulation for housing.

The only question is, was there any violation of the rent registration on March 1, 1942, with the schedule of overcharges, which the defendant admits were made, and for which they collected the rents.

The equities of the case demand that we get whatever relief is available by way of restitution. I feel that there is sufficient authority, your Honor, to invoke the equity jurisdiction [42] of this Court.

Mr. Lande: May it please the court, it is interesting to note that the plaintiff comes in here and throws himself on the mercy of the equity powers and remedies of the court. I point out to the court that this is not an action by the government for equitable relief for the benefit of the government, but it is for the benefit of certain individuals, in an action for restitution. I call your Honor's attention to the case of *Porter vs. Montgomery*, 163 Fed. (2d) 211, in which the court went at great length to determine and discuss an action brought for the benefit of the individual and those actions in which the government can get any relief.

The Court: I have that case before me but that was a price case, an overcharge where the amount is a fixed amount, whichever is the greater, \$50 or a suit for the overcharge. The court in that case inclines to the view that because of that it was

more of a penalty. The real point before the court was whether the action survived, and the court held it did not survive because it was in the nature of a penalty. That is not before us here.

Mr. Lande: The theory is very applicable. If the action did not survive because it was a matter of a statute which created the penalty, it would not survive here.

The Court: That is not the point before us. The point before us is that the Supreme Court has held that you can also [43] do equity by compelling restitution. You can do that whether you give a judgment for the amount recovered or not. The way it goes in my judgment is that the administrator is directed to return the money when collected from the defendant to the particular tenants, because you can't have the judgment in favor of the tenants, because they are not parties to the action. So now the question before me is this: No injunction is necessary here because they do not own the property any more and did not own it at the time this action was brought. Now there can be no recovery of the amount.

The question is should I allow the overcharges under the equity power or should I apply the principles to which I refer, that ordinarily we will consider the period of laches the same as the statute of limitation. In other words, a delay for the length in which a civil action would be outlawed is the type of delay which in California, and generally, is considered as laches. In my cases, I have held that where the periods are long the courts have

cut them down, as in the Akley case. So that is the problem before me.

There is no showing of fraud. Whether it was a misconception I do not know. He wrote a letter in July 1944 and until that time they felt evidently that they had registered properly and charged the proper rent. Then there was correspondence back and forth which ultimately resulted in a new registration. All the time since 1944 the administrator had [44] evidently questioned the propriety of the registration, and even after the new registration there was a delay of over a year in instituting this action. In *Cleimclaus vs. Dutard*, 147 Cal. 245, the court said:

“There is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine. Each case as it arises must necessarily be determined by its own circumstances, or as said by this court in *Bell vs. Hudson*, 73 Cal. 285: ‘In other words, the question is addressed to the sound discretion of the chancellor in each case.’ ”

In that case it was said that the statute of limitation had not run. They held 27 months delay in bringing the action was too long a delay to be considered in equity, even though the statute of limitations had not run. The argument in the case was that laches should not apply because the statute of limitation did not divest anybody of title and that by the Civil Code of California, title by adverse possession could not be acquired under five years.

But they said otherwise. So that is the point before the court.

Mr. Lande: I am reluctant to pursue it further, sir, because you obviously are much better informed on it than either counsel.

Under the whole trend of events what brought the matter [45] to the attention of the Housing Expediter was the letter written by the defendant himself in July of 1944. As a matter of fact, the rejection was not made before 1945. And late in December 1945 action was filed by the Housing Expediter to make these people comply and they were called down to the Office of the Housing Expediter and got the necessary forms and filled them out.

I think we can appreciate the problem that the Expediter had with 85 of these to file. So these people who had attempted in October 1945 to file these papers, they were made parties to an action started by the Housing Expediter to require them to comply with what they were already doing, and they asked for a temporary injunction and for restitution. That suit was dismissed. Why was it dismissed? Because there wasn't anything improper.

Here was a mistake. These people had taken the path of least resistance, and with the great power of the United States the Housing Expediter says, "You have got to do this." Very few people will take it upon themselves to contest that. That was all these people did. That required the Housing Expediter back in 1945 or 1946 to dismiss that suit, because he knew these people were not acting im-

properly and there was some question at that time as to the registration.

Referring to the letter of July 1944, Mr. McCord wrote, he set forth that 66 per cent of his property is transient, [46] and I with Mr. Hoffman had just completed several hours on that very problem with the aid of Mr. Noyes and had there difficulty establishing whether it was a hotel. The Administrator some time afterwards decontrolled two of these apartments. I simply point that out to show that there was some question about it at all times and at all times these people sought to comply with the OPA.

It is pretty obvious that the Administrator felt there had been an improper action. What is the position of these people? They had to pay an income tax for 1942, 1943 and 1944 on the basis of these rents. These returns cannot be amended because the three-year period has run. They have paid out money on income. And there is no way they can protect themselves. The government ought to come in here and do equity. They have asked this court as an equity court to do something improper by their own action. There is certainly an obligation; if the government does not know from 1942 to 1945 what the score is, how do these poor people, whose only contact with the law is the OPA office, know what to do? The officers cannot sit by for three years and all of a sudden say you have made a mistake.

What is the effect of the mistake? The effect of that mistake is that actually the order is retro-

active for the rental. That is what the effect of the action is.

I wish to cite the case of *Collins vs. Fleming*, 163 Fed. [47] (2d) 431, and also the case of *Bowles vs. Griffin*, 161 Fed. (2d) 458, which holds that if the landlord deceitfully procured the rent fixing order from the rent director, the landlord cannot rely thereon in the tenants' action for penalty for overcharging for housing accommodations.

That is the situation here. There is no bad faith. There is no fraud.

I think the issues are clear and there is nothing more that need be said than to state our position which is exactly as the court has enunciated, and that is that while the Housing Expediter cannot himself recover, equity is governed by the statute of limitations which is the equivalent of the doctrine of laches.

Mr. Hirst: Your Honor, I think counsel paints an unduly harsh picture of the prosecution complex of this government, indicating that the Administrator of rent control would go out and the government would sit around with these people and we have nothing to do but file these actions.

As a matter of fact, counsel is well aware of the principles that govern agencies, and they are presumed to do their duties under the law. Your Honor has noted in one of the decisions that very point was made. I will state to the court in my opinion, in view of the law and of the cases, there is no issue of the retroactive effect of any order involved. We are back to March 1942. From that date you de-

termine what is [48] the maximum rent of these various accommodations. It is on the basis of the second registration, and there is no retroactive effect. That is made clear in the brief. I won't go into that point any more except to cite one decision, *Kalvar vs. McKinnon*, which is a Circuit Court of Appeals decision from the First District:

“It is clear, we think, that the figure put down by the landlord that the rent he was receiving on the freeze date does not become even tentatively, the legal maximum rent. If the landlord makes a false statement in the registration statement or if he neglects to file a registration statement, he may be subject to criminal penalties under Section 205(b) of the Act; but in either case the legal maximum rent is determined by the formula set forth in Section 1388.284, and in any litigation where the point becomes relevant the rent which was actually being charged on the freeze date must be factually determined.”

That is what we have to determine here; in March, the first of March, 1942, the rent was in accordance with the registration which was filed ultimately on February 16, 1946.

There is just one thing further. The defendant makes the point, counsel makes the point, that the defendant wrote a letter, and 56 per cent of his accommodations as being rented [49] on a transient basis. That is absolutely refuted by the regulations themselves.

The Court: I think he meant at the time he wrote the letter. It might have been true at the time he wrote the letter.

Mr. Hirst: We won't question that. The main point is not what he was charging then, but what he charged on March 1st, 1942.

I think, your Honor, in taking into account laches, we ask that the refund should be made the tenants because they were overcharged. The landlord had plenty of time, your Honor, from July 1944. There is a record before your Honor to show that the agency persistently requested the defendant to furnish information, which was not forthcoming until a much later date. He did not stop his operations and catch his breath and see what he was doing. He was continuing to operate. He knew the Administrator had questioned him and, as a reasonable man, he should have immediately complied with all the requests for information, and certainly the three years prior period from the date of the filing of the original registration, to the date that the defendant himself wrote the letter, that period cannot mitigate against the government, because the registrations are filed by the landlord. There is no provision made that the agency should investigate each registration filed to see if the landlord made a false [50] statement. He is presumed to file them pursuant to law. There is no way the government can process millions of applications on that basis. It is presumed the facts stated are true. As a matter of fact, there is a provision for penalty. It is stated on the registration that a false state-

ment may subject them to a penalty of \$5,000 and 10 years, or something of that nature.

The Court: Gentlemen, I do not like to establish a precedent of law and equity relief by way of restitution beyond the period of one year. In other words, if the remedy at law is barred, and no injunction can issue, then there should be no restitution beyond that period. That is the law of California and is the law of every place.

Mr. Hirst: I hesitate to interrupt your Honor but I want to make reference to the case of United States vs. Martha Ensley. That goes to the point of laches, your Honor. It is squarely held that the United States is not bound by any statute of limitations, nor is it barred by any laches of its officers.

We will admit that so far as the legal statute of limitations are concerned we are so barred. There is the difference, your Honor. This is not a private individual suing a private individual at all. I understand that these people own hotel property at this time, and the fact that they have sold out a hotel interest should not wipe the slate clean so [51] far as a violation is concerned. This is a chancery court, and is asked to exert its equity jurisdiction and not be limited to a one-year period.

The Court: I am aware that the government is not barred by any statute of limitation. In fact, I wrote an opinion in San Diego, where the government sued the County of San Diego for damages caused by fire in a forest reserve. The government allowed the county to build a road through the National Forest, and the county agreed that the gov-

ernment should be reimbursed for any fire caused during the construction of such road, by the county, or workmen working under its control. The government brought suit, and the county filed a motion to dismiss upon the ground that the government had not complied with the rule which required presenting a formal claim to the Board of Supervisors.

In my opinion I cited cases to the effect that the statute of limitation, and the presentation of claims, such, as for instance, presenting a claim to probate, before you can sue, and the like, are not binding on the government. In other words, the sovereign, the United States, only binds itself by direct provisions, where it allows itself to be sued.

That is not the point here. The Congress has put down a statute of limitations, and has said the government shall not be sued beyond that period. The Supreme Court has said, in exercising powers under this Act we have an additional [52] power. That is, to order restitution. The question is, when shall that be exercised? Therefore, the recovery being for the benefit of the persons, that is, restitution to the individuals, those individuals could themselves have brought suit. They did not, and in the case of *Blood v. Fleming*, 161 Fed. (2d), 292, the court said:

“Limitations upon the powers of the court to proceed under the provisions of this section are governed by equitable considerations. Whether an action may be maintained under this section is not controlled by the one year

limitation set up in Section 205(e). It may be instituted within such time as is not barred by laches. Appellant did not plead, nor does he assert, that he was prejudiced by the delay of more than one year in the institution of the action."

A fact which cannot be contradicted is that generally courts of equity, in ruling on the subject of laches, will coordinate that with the statute of limitations. I call attention to the leading case in California of *Akley v. Bassitt*, in which the court even went beyond that, and held, even though the statute of limitations had not run at the time the action was instituted, nevertheless, in point of equity, laches had occurred, which barred the action from being instituted.

I agree with Mr. Hirst to this extent: That the government had a right to assume that anybody who made a registration made an honest registration, and it was not until their attention was called to the fact that possibly the registration was incorrect, were they required to act.

The evidence shows, without contradiction, that the defendants, as did other persons, sought advice. They did not know one form from another, nor did anyone, as a matter of fact, until these forms were actually put out.

There is no showing that they fraudulently tried to run this as a hotel. They were under the belief, evidently, that they had a right to run it. By the same token, the Administrator had a right to rely upon the fact that the rent was correctly repre-

sented according to the formula which was established as of March 1942, the freezing date for rentals.

However, this fact remains, that ever since 1944, the enforcement agency questioned this registration. They began negotiations, through letters, to secure a different registration. Ultimately a registration was secured. They waited thirteen months until they instituted this action. There has been a change of possession, not only in surrendering the property, but also in reporting this matter, and the income which they received, on which they had to pay taxes.

Therefore, I believe that the facts in this case do not call for the exercise of the chancellor's power of reimbursement, because neither the plaintiff, nor the renters [54] themselves, can recover. I think they should be charged with laches on their own part, because they did not have to wait for the Administrator to bring action. They could have brought action in the State courts, or in this court, to recover the amount. I feel this is a sound principle to follow. As I have intimated before, whether to Mr. Hirst, or Mr. Solof, or to the men up in Fresno, I believe that laches for a period of one year should bar reimbursement in these cases.

Therefore, I will find against the plaintiff upon the grounds I have indicated, that there has been no fraud or concealment. There may have been a mistake, but there was too much delay on the part of the Expediter, and on the part of the persons entitled to bring suit, and the condition of the de-

fendant is so changed that it would be inequitable to order reimbursement at the present time.

Will you waive findings?

Mr. Lande: Yes, I am perfectly willing to.

Mr. Hirst: I cannot at this time, because I will have to consult with my superior.

Mr. Lande: We will prepare findings.

The Court: Prepare findings, unless the same are waived by counsel. [55]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of September A. D., 1948.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: No. 12039. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. John McCord and Florence McCord, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 20, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 12039

United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office
of the Housing Expediter,

Appellant,

vs.

JOHN McCORD and FLORENCE McCORD,

Appellees.

SUPPLEMENTAL
Transcript of Record
EXHIBITS

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED
Jan 19 1949

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Appeal from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Exhibits for Plaintiff:

- 1—Registration forms filed by John McCord
(Form DH-D) 109-116
- 2—First Original Forms filed by Florence
McCord (Form DD-U) 117
- 3—File of Area Rent Office 119-134
- 4—Letter, Sept. 5, 1945, James R. Carnes, Dis-
trict Rent Compliance Attorney to John
McCord 135

PLAINTIFF'S EXHIBIT No. 2

(Admitted in Evidence 2-10-48)

[Clerk's Note]: Plaintiff's Exhibit No. 2 consists of 85 forms, of which the first form, set forth on next page, serves as an exemplar.

253603

Served 8/3/45

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION

FORM APPROVED
BUREAU NO. 9-1-30-12
Form DHD
AREA OFFICE COPY

Registration of Hotels, Rooming Houses, Boarding Houses, Dormitories, Auto
Camps, Residence Clubs, Tourist Homes and Cabins, and Trailer Camps

(TYPE OR PRINT PLAINLY - DO NOT FOLD)

Please Read the Instructions Carefully Before Filling
Out This Registration Statement

SECTION A - IDENTIFICATION

- This establishment is a:
 - Hotel ☒ Trailer Camp ☐
 - Rooming House ☐ Residence Club ☐
 - Boarding House ☐ Tourist Home ☐
 - Dormitory ☐ Tourist Cabin ☐
 - Auto Camp ☐
- Total Number of Rooms for Rent: 85
- Total Number of Occupants
When Fully Rented: _____
- Total Number of Bathrooms: 85
- Was the taking of meals required as a condition of
renting any room in this establishment on June 15,
1942? Yes ☐ No ☒
- Name of Establishment: Belmont Apt. Hotel
- Street Address: 548 So. Figueroa St.
- John V. Mc Card
NAME OF LANDLORD
548 So. Figueroa St.,
STREET ADDRESS
Los Angeles, Calif.
CITY AND STATE
- Did this establishment rent rooms or offer them
for rent on March 1, 1942?
Yes ☒ No ☐
If the answer is "no", on what date did this
establishment first offer rooms for rent after
March 1, 1942? _____

SECTION B - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Note: If the room was actually rented at the rent reported and not merely offered for rent,
indicate by placing an "X" in the box after the amount.

If there was only a single rate covering both room and meals, apportion the total charge be-
tween a charge for meals and a charge for room rent. The apportionment must be fair and reason-
able. ENTER ONLY THE CHARGE FOR ROOM RENT.

- Are any of the rents entered below apportioned from a single charge for room and meals? Yes ☐ No ☒
- Schedule of maximum legal rents: *PHD Registration Void*

Room Num- ber or Location	DAILY RATE			WEEKLY RATE			MONTHLY RATE		
	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons
201	2.00 <input checked="" type="checkbox"/>	2.00 <input checked="" type="checkbox"/>	3.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	12.50 <input type="checkbox"/>	35.00 <input type="checkbox"/>	35.00 <input checked="" type="checkbox"/>	40.00 <input type="checkbox"/>
202	2.00 <input type="checkbox"/>	2.00 <input type="checkbox"/>	3.00 <input checked="" type="checkbox"/>	10.00 <input type="checkbox"/>	10.00 <input checked="" type="checkbox"/>	12.50 <input type="checkbox"/>	35.00 <input type="checkbox"/>	35.00 <input checked="" type="checkbox"/>	40.00 <input type="checkbox"/>
203	1.00 <input type="checkbox"/>	- <input type="checkbox"/>	- <input type="checkbox"/>	3.75 <input type="checkbox"/>	- <input type="checkbox"/>	- <input type="checkbox"/>	15.00 <input checked="" type="checkbox"/>	- <input type="checkbox"/>	- <input type="checkbox"/>
204	2.00 <input type="checkbox"/>	2.00 <input type="checkbox"/>	3.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	12.50 <input type="checkbox"/>	35.00 <input type="checkbox"/>	35.00 <input checked="" type="checkbox"/>	40.00 <input type="checkbox"/>
205	2.00 <input type="checkbox"/>	2.00 <input type="checkbox"/>	3.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	12.50 <input type="checkbox"/>	27.50 <input type="checkbox"/>	27.50 <input checked="" type="checkbox"/>	35.00 <input type="checkbox"/>
206	2.00 <input type="checkbox"/>	2.00 <input type="checkbox"/>	3.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	10.00 <input type="checkbox"/>	12.50 <input type="checkbox"/>	32.50 <input type="checkbox"/>	32.50 <input checked="" type="checkbox"/>	37.50 <input type="checkbox"/>
207	3.00 <input type="checkbox"/>	3.50 <input type="checkbox"/>	4.00 <input type="checkbox"/>	15.00 <input type="checkbox"/>	17.50 <input type="checkbox"/>	20.00 <input type="checkbox"/>	45.00 <input type="checkbox"/>	45.00 <input type="checkbox"/>	50.00 <input checked="" type="checkbox"/>

If additional space is required, continue on the back of this sheet.

4-4.50 WEEKLY 4-22.50

4-50.00

The rates reported in Section B are the Maximum Legal Rents which may be charged. Any charge in
excess of those rates, unless previously authorized in accordance with the Maximum Rent Regulation, may sub-
ject you to a \$5,000 fine or imprisonment for one year, or both, and to damages payable to the tenant amounting
to three times the overcharge, plus attorney's fees. A false statement on this form may subject you to a \$5,000
fine or imprisonment for one year, or both.

I HEREBY REPRESENT that all statements and entries given herein or attached hereto are true and
correct.

12/15/45

Signature of Landlord or his Agent

SECTION B (Continued) - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Room Number or Location	DAILY RATE			WEEKLY RATE			MONTHLY RATE		
	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons
208	1.00	2.00	3.00	7.00	10.00	12.50	32.50	35.00	40.00
209	2.00	2.00	2.50	10.00	10.00	12.50	32.50	37.50	40.00
210	<i>Manager</i>								
211	2.00	2.00	3.00	10.00	12.50	16.00	35.00	35.00	40.00
212	3.00	3.50	4.00	15.00	17.50	20.00	45.00	45.00	45.00
214	2.00	2.00	3.00	10.00	10.00	12.50	25.00	25.00	25.00
215	2.00	2.00	3.00	7.00	7.00	12.50	37.50	32.50	35.00
216	3.00	3.50	3.50	18.00	20.00	42.50	55.00	55.00	60.00
217	2.00	2.00	3.00	8.00	10.00	9.00	37.50	35.00	37.00
218	2.00	2.00	3.00	10.00	10.00	12.50	32.50	32.50	37.50
301	2.00	2.00	3.00	10.00	10.00	12.50	32.50	32.50	37.50
302	2.00	2.00	3.00	10.00	10.00	12.50	32.50	32.50	37.50
303	1.00	-	-	3.75	-	-	15.00	-	-
304	2.00	2.00	3.00	10.00	10.00	12.50	35.00	35.00	37.50
305	2.00	2.00	3.00	10.00	10.00	12.50	35.00	35.00	37.50
306	2.00	2.00	2.50	10.00	10.00	12.50	35.00	35.00	37.50
307	3.00	3.50	4.00	18.00	20.00	22.50	50.00	50.00	46.00
308	2.00	2.00	3.00	10.00	10.00	12.50	35.00	35.00	37.50
309	2.00	2.00	3.00	10.00	10.00	12.50	35.00	37.50	37.50
310	3.00	3.50	4.00	18.00	20.00	42.50	50.00	55.00	57.50
311	2.00	2.00	3.00	10.00	12.50	15.00	37.50	37.50	40.00
312	2.00	2.00	3.00	10.00	12.50	15.00	35.00	35.00	40.00
314	2.00	2.00	3.00	10.00	10.00	15.00	37.50	37.50	40.00
315	2.00	2.00	2.50	10.00	10.00	12.50	37.50	37.50	37.50
316	3.00	3.50	4.00	18.00	20.00	22.50	50.00	55.00	55.00
317	2.00	2.00	2.50	10.00	10.00	12.50	35.00	35.00	37.50
318	2.00	2.00	2.50	10.00	10.00	12.50	35.00	37.50	40.00
401	2.00	2.00	2.50	10.00	10.00	12.50	35.00	35.00	40.00
402	2.00	2.00	2.50	10.00	10.00	12.50	37.50	35.00	40.00

If additional space is required, obtain continuation sheets from the Area Rent Office, fill out in duplicate, and attach.

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION

FORM 4 APPROVED
BUDGET BUREAU NO. 08-R 030-42
Form DH-D
AREA OFFICE COPY

Registration of Hotels, Rooming Houses, Boarding Houses, Dormitories, Auto Camps, Residence Clubs, Tourist Homes and Cabins, and Trailer Camps

(TYPE OR PRINT PLAINLY - DO NOT FOLD)

Please Read the Instructions Carefully Before Filling Out This Registration Statement

SECTION A - IDENTIFICATION

1. This establishment is a:
 Hotel ☒ Trailer Camp ☐
 Rooming House ☐ Residence Club ☐
 Boarding House ☐ Tourist Home ☐
 Dormitory ☐ Tourist Cabin ☐
 Auto Camp ☐
 2. Total Number of Rooms for Rent: 85
 3. Total Number of Occupants
 When Fully Rented: _____
 4. Total Number of Bathrooms: 85
 5. Was the taking of meals required as a condition of
 renting any room in this establishment on June 15,
 1942? Yes ☐ No ☒

6. Name of Establishment: Belmont Apt. Hotel
 7. Street Address: 548 So. Figueroa St.

8. JOHN V. MC GOW
 NAME OF LANDLORD
548 So. Figueroa St.
 STREET ADDRESS
LOS ANGELES, CALIF.
 CITY AND STATE

10. 548 So. Figueroa St.
 11. Did this establishment rent rooms or offer them
 for rent on March 1, 1942?
 Yes ☒ No ☐

If the answer is "no", on what date did this
 establishment first offer rooms for rent after
 March 1, 1942? _____

SECTION B - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Note: If the room was actually rented at the rent reported and not merely offered for rent,
 indicate by placing an "X" in the box after the amount.

If there was only a single rate covering both room and meals, apportion the total charge be-
 tween a charge for meals and a charge for room rent. The apportionment must be fair and reason-
 able. ENTER ONLY THE CHARGE FOR ROOM RENT.

1. Are any of the rents entered below apportioned from a single charge for room and meals? Yes ☐ No ☐
 2. Schedule of maximum legal rents. Reg. Ord.

Room Number or Location	DAILY RATE			WEEKLY RATE			MONTHLY RATE		
	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons
403	1.00	—	—	4.00	—	—	12.00	X	—
404	2.00	2.50	2.50	10.00	10.00	17.50	37.50	X	40.00
405	2.00	2.00	2.50	10.00	10.00	17.50	37.50	X	35.00
406	2.00	2.00	2.50	10.00	10.00	17.50	37.50	X	40.00
407	3.00	3.50	4.00	11.75	X	15.00	42.00	50.00	57.50
408	2.00	2.00	2.50	10.00	10.00	17.50	37.50	X	37.50
409	2.00	2.00	2.50	10.00	10.00	17.50	37.50	X	40.00

If additional space is required, continue on the back of this sheet.

WARNING

The rates reported in Section B are the Maximum Legal Rents which may be charged. Any charge in excess of those rates, unless previously authorized in accordance with the Maximum Rent Regulation, may subject you to a \$5,000 fine or imprisonment for one year, or both, and to damages payable to the tenant amounting to three times the overcharge, plus attorney's fees. A false statement on this form may subject you to a \$5,000 fine or imprisonment for one year, or both.

I HEREBY REPRESENT that all statements and entries given hereon or attached hereto are true and correct.

Date

Signature of Landlord or his Agent

SECTION B (Continued) - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Room Number or Location	DAILY RATE			WEEKLY RATE			MONTHLY RATE		
	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons
410	3.00	3.50	4.00	18.00	20.00	22.50	45.00	45.00	45.00
411	2.50	2.50	3.00	17.50	17.50	15.00	37.50	40.00	42.50
412	2.00	2.00	2.50	10.00	10.00	15.00	37.50	37.50	40.00
414	2.00	2.00	2.50	10.00	10.00	15.00	36.00	35.00	40.00
415	2.00	2.00	2.50	10.00	10.00	15.00	32.50	35.00	37.50
416	3.00	3.50	4.00	18.00	20.00	22.50	45.00	50.00	55.00
417	2.00	2.00	2.50	10.00	10.00	12.50	35.00	35.00	37.50
418	2.50	2.50	3.00	17.00	17.00	15.00	37.50	40.00	42.50
501	2.00	2.00	2.50	10.00	10.00	17.50	30.00	30.00	35.00
502	2.00	2.00	2.50	10.00	10.00	12.50	35.00	35.00	40.00
503	1.00	-	-	4.00	-	-	15.00	-	-
504	2.00	2.00	2.50	10.00	10.00	17.50	32.50	35.00	37.50
505	2.00	2.00	2.50	10.00	10.00	17.50	37.50	37.50	37.50
506	2.00	2.00	2.50	10.00	10.00	12.50	35.00	37.50	40.00
507	3.00	3.50	4.00	18.00	20.00	22.50	50.00	50.00	55.00
508	2.00	2.00	2.50	10.00	10.00	17.50	35.00	35.00	37.50
509	2.00	2.00	2.50	10.00	10.00	17.50	37.50	37.50	40.00
510	3.00	3.50	4.00	18.00	20.00	22.50	45.00	50.00	55.00
511	2.00	2.00	2.50	10.00	10.00	17.50	35.00	37.50	40.00
512	2.00	2.00	2.50	10.00	10.00	17.50	37.50	37.50	37.50
514	2.00	2.00	3.00	10.00	10.00	12.50	32.50	32.50	40.00
515	2.00	2.00	2.50	10.00	10.00	17.50	37.50	37.50	37.50
516	3.00	3.50	4.00	18.00	20.00	22.50	50.00	50.00	55.00
517	2.00	2.00	2.50	10.00	10.00	17.50	35.00	35.00	37.50
518	2.50	2.50	3.00	17.50	17.50	15.00	37.50	40.00	42.50
601	2.00	2.00	2.50	10.00	10.00	17.50	30.00	30.00	35.00
602	2.00	2.00	2.50	10.00	10.00	17.50	37.50	35.00	37.50
603	1.00	-	-	3.75	-	-	15.00	-	-
604	2.00	2.00	3.00	10.00	10.00	12.50	32.50	37.50	40.00

If additional space is required, obtain continuation sheets from the Area Rent Office, fill out in duplicate, and attach.

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATIONRegistration of Hotels, Rooming Houses, Boarding Houses, Dormitories, Auto
Camps, Residence Clubs, Tourist Homes and Cabins, and Trailer Camps

(TYPE OR PRINT PLAINLY - DO NOT FOLD)

Please Read the Instructions Carefully Before Filling
Out This Registration Statement

SECTION A - IDENTIFICATION

1. This establishment is a:
 Hotel ☒ Trailer Camp ☐
 Rooming House ☐ Residence Club ☐
 Boarding House ☐ Tourist Home ☐
 Dormitory ☐ Tourist Cabin ☐
 Auto Camp ☐
2. Total Number of Rooms for Rent: 85
3. Total Number of Occupants
When Fully Rented: _____
4. Total Number of Bathrooms: 85
5. Was the taking of meals required as a condition of
renting any room in this establishment on June 15,
1942? Yes ☐ No ☒

6. Name of Establishment: Belmont Apt. Hotel
 7. Street Address: 648 So. Figueroa St.

8. John V. Mc Gird
 NAME OF LANDLORD
648 So. Figueroa St.
 STREET ADDRESS
Los Angeles, Calif.
 CITY AND STATE

10. Did this establishment rent rooms or offer them
for rent on March 1, 1942?
 Yes ☒ No ☐

If the answer is "no", on what date did this
establishment first offer rooms for rent after
March 1, 1942?

SECTION B - MAXIMUM LEGAL RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Note: If the room was actually rented at the rent reported and not merely offered for rent,
indicate by placing an "X" in the box after the amount.

If there was only a single rate covering both room and meals, apportion the total charge be-
tween a charge for meals and a charge for room rent. The apportionment must be fair and reason-
able. ENTER ONLY THE CHARGE FOR ROOM RENT.

1. Are any of the rents entered below apportioned from a single charge for room and meals? Yes ☐ No ☒
 2. Schedule of maximum legal rents. Reg. Void

Room Num- ber or Location	DAILY RATE			WEEKLY RATE			MONTHLY RATE		
	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons
605	2.00 <input checked="" type="checkbox"/>	2.00 <input checked="" type="checkbox"/>	2.50 <input type="checkbox"/>	14.00 <input type="checkbox"/>	16.00 <input type="checkbox"/>	17.50 <input type="checkbox"/>	24.00 <input type="checkbox"/>	35.00 <input checked="" type="checkbox"/>	27.50 <input type="checkbox"/>
606	2.00 <input type="checkbox"/>	2.00 <input type="checkbox"/>	2.50 <input type="checkbox"/>	14.00 <input type="checkbox"/>	16.00 <input type="checkbox"/>	17.50 <input type="checkbox"/>	27.50 <input type="checkbox"/>	37.50 <input checked="" type="checkbox"/>	40.00 <input type="checkbox"/>
607	3.00 <input type="checkbox"/>	3.50 <input type="checkbox"/>	4.00 <input type="checkbox"/>	18.00 <input type="checkbox"/>	18.00 <input type="checkbox"/>	22.50 <input type="checkbox"/>	50.00 <input type="checkbox"/>	52.50 <input checked="" type="checkbox"/>	4-57.50 <input type="checkbox"/>
608	2.00 <input type="checkbox"/>	2.00 <input type="checkbox"/>	2.50 <input type="checkbox"/>	14.00 <input type="checkbox"/>	16.00 <input type="checkbox"/>	17.50 <input type="checkbox"/>	22.50 <input type="checkbox"/>	37.50 <input checked="" type="checkbox"/>	37.50 <input type="checkbox"/>
609	2.00 <input type="checkbox"/>	2.50 <input type="checkbox"/>	3.00 <input type="checkbox"/>	14.00 <input type="checkbox"/>	17.50 <input type="checkbox"/>	15.00 <input type="checkbox"/>	35.00 <input checked="" type="checkbox"/>	37.50 <input type="checkbox"/>	40.00 <input type="checkbox"/>
610	3.00 <input type="checkbox"/>	3.50 <input type="checkbox"/>	4.00 <input type="checkbox"/>	18.00 <input type="checkbox"/>	20.00 <input type="checkbox"/>	22.50 <input type="checkbox"/>	55.00 <input type="checkbox"/>	55.00 <input checked="" type="checkbox"/>	4-65.00 <input type="checkbox"/>
611	2.50 <input type="checkbox"/>	2.50 <input type="checkbox"/>	3.50 <input type="checkbox"/>	17.50 <input type="checkbox"/>	17.50 <input type="checkbox"/>	15.00 <input type="checkbox"/>	37.50 <input checked="" type="checkbox"/>	4.00 <input type="checkbox"/>	42.50 <input type="checkbox"/>

If additional space is required, continue on the back of this sheet.

WARNING

The rates reported in Section B are the Maximum Legal Rents which may be charged. Any charge in excess of those rates, unless previously authorized in accordance with the Maximum Rent Regulation, may subject you to a \$5,000 fine or imprisonment for one year, or both, and to damages payable to the tenant amounting to three times the overcharge, plus attorney's fees. A false statement on this form may subject you to a \$5,000 fine or imprisonment for one year, or both.

I HEREBY REPRESENT that all statements and entries given hereon or attached hereto are true and correct.

Date

12/15/42

Signature of Landlord or his Agent

John V. McGird

Form DH-U
Form approved Budget Bureau
No. 08-R030-42
AREA OFFICE COPY

Please Read the Instructions Carefully Before Filling
Out This Registration Statement

D.

Signature of Landlord or His Agent

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION

Form DH-U
Form approved Budget Bureau
No. 06-R030-42
LANDLORD'S COPY

Registration of Hotels, Rooming Houses, Boarding Houses, Dormitories, Auto
Camps, Residence Clubs, Tourist Homes and Cabins, and Trailer Camps

(TYPE OR PRINT PLAINLY - DO NOT FOLD)

Please Read the Instructions Carefully Before Filling
Out This Registration Statement

SECTION A - IDENTIFICATION

1. This establishment is a:

Hotel	<input checked="" type="checkbox"/>	Trailer Camp	<input type="checkbox"/>
Rooming House	<input type="checkbox"/>	Residence Club	<input type="checkbox"/>
Boarding House	<input type="checkbox"/>	Tourist Home	<input type="checkbox"/>
Dormitory	<input type="checkbox"/>	Tourist Cabin	<input type="checkbox"/>
Auto Camp	<input type="checkbox"/>		
2. Total Number of Rooms for Rent: _____
3. Total Number of Occupants
When Fully Rented: _____
4. Total Number of Bathrooms: _____
5. Was the taking of meals required as a condition of
renting any room in this establishment on June 15,
1942? Yes ☐ No ☐

6. Name of Establishment: HEMET APT HOTEL
7. Street Address: 948 So Figueroa
8.

JOHN McCORD
NAME OF LANDLORD
ALESSANDRO HOTEL
STREET ADDRESS
HEMET CA
CITY AND STATE
9. _____
10. _____
11. Did this establishment rent rooms or offer them
for rent on the maximum rent date?
Yes ☐ No ☐
If the answer is "no", on what date did this
establishment first offer rooms for rent after
the maximum rent date? _____

SECTION B - MAXIMUM RENTS FOR ROOMS RENTED OR OFFERED FOR RENT

Note: If the room was actually rented at the rent reported and not merely offered for rent, indicate by placing an "X" in the box after the amount.

If there was only a single rate covering both room and meals, apportion the total charge between a charge for meals and a charge for room rent. The apportionment must be fair and reasonable. ENTER ONLY THE CHARGE FOR ROOM RENT.

1. Are any of the rents entered below apportioned from a single charge for room and meals? Yes ☐ No ☒
2. Schedule of maximum rents.

Void *Weekly*

Room Number or Location	DAILY RATE			WEEKLY RATE			MONTHLY RATE		
	one person	two persons	three persons	one person	two persons	three persons	one person	two persons	three persons
210		5	7.50		22.50	25.00	27.50	80.00	90.00

If additional space is required, continue on the back of this sheet.

WARNING

The rates reported in Section B are the Maximum Rents which may be charged. Any charge in excess of those rates, unless previously authorized in accordance with the Rent Regulation, may subject you to a \$5,000 fine or imprisonment for one year, or both, and to damages payable to the tenant amounting to three times the overcharge, plus attorney's fees. A false statement on this form may subject you to a \$5,000 fine or imprisonment for one year, or both.

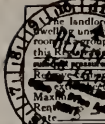
I HEREBY REPRESENT that all statements and entries given hereon or attached hereto are true and correct.

Date

Signature of Landlord or his Agent

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY - DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

Form Approved
Bureau No. 100-107-10
Form DD-U
Do Not Fold Here
AREA OFFICE
COPY



Each landlord is required to register separately each rental dwelling unit which is occupied or vacant. A dwelling unit is a room or group of rooms for which a single rent is paid. Complete this statement for each unit in triplicate. (If not type-written, be sure each copy is typed and each copy has carbon copies as clear and distinct.)
Rent for gas, and heat or bring the three copies to the Area Rent Office.
On triplicate, for sections "D" & "E" if necessary.

Maximum Rent \$42 Effective Date 10-16-45

SECTION A. MAILING ADDRESS OF LANDLORD

1. Name of Landlord John McCord
2. Name of Agent
3. Address Mail to:

Name John McCord
Address 424 Ontario
City and State Ontario Calif

SECTION B. MAILING ADDRESS OF TENANT

Name Tenant Sittow
Address 948 So. Figueroa
City and State L.A.

SECTION C. MAXIMUM RENT

Read carefully and fill in every item which applies to this dwelling unit.

- Rent on "Maximum Rent date" \$3.00 per week () per month (X)
- Not rented on "Maximum Rent date" but rented at any time during the two-month period ending on "Maximum Rent date."
Date last rented during that two-month period: 194
- Not rented on "Maximum Rent date" nor at any time during the two-month period ending on "Maximum Rent date," but rented after "Maximum Rent date."
Check one box if applicable:
☐ (a) Owner occupied or vacant on "Maximum Rent date" and during two month period ending on "Maximum Rent date."
☐ (b) Newly constructed without priority rating.
☐ (c) Newly constructed with priority rating. (If checked, item 6 must also be filled in.)
Date first rented after "Maximum Rent date." 194
- Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after "Maximum Rent date."
Date first rented after such change: 194
- Substantially changed after "Maximum Rent date," but before the "effective date." Check one box if applicable:
☐ (a) From unfurnished to fully furnished.
☐ (b) From fully furnished to unfurnished.
☐ (c) By a major capital improvement AS DISTINGUISHED FROM ORDINARY REPAIR, REPLACEMENT AND MAINTENANCE.
Date first rented after such change: 194
- Dwelling unit newly constructed with a priority rating from the United States or any agency thereof.
Rent approved by agency granting priority: \$ per week () per month ()
- THE MAXIMUM RENT FOR THIS DWELLING UNIT IS:
\$3.00 per week () per month (X)

Enter Maximum Rent in accordance with the following instructions:

- If only one of the above items applies to this dwelling unit the Maximum Rent is the rent entered for that item.
 - If more than one of the above items apply to this dwelling unit the Maximum Rent is the rent reported for the most recent date; except in the case of item 6.
 - If item 6 applies to this dwelling unit the Maximum Rent is the lower of the rents entered in items 1, 3 or 6.
- NOTE: If any one of the items 2 (b), 4 or 5 applies to this dwelling unit you must also fill in the information required in Section "E". The Rent Director may at any time order a decrease in the Maximum Rent determined under items 3 (a), 3 (b), 4 or 5, on the grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on the "Maximum Rent date."

- Order imposed by Rent Director dated established maximum rent in amount of \$ per week () per month ()

Section E - See Note Section C, 7 *

If item 3(b), 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:

- New construction
- A change in the number of dwelling units
- A change from unfurnished to fully furnished
- A major capital improvement

IDENTIFICATION

- 948 So. Figueroa St. L.A.
- 201
- Apartment number or location
3. Number of Rooms in unit being registered 2
4. Total Number of dwelling units in this structure 85

SECTION D. EQUIPMENT AND SERVICES.
(Check the equipment and services included in the rent on "Maximum Rent date" or the most recent date you entered in Section C.)
(ANSWER "YES" or "NO")

1. EQUIPMENT YES NO
- Furniture ☒ ☐
 - Running Water ☒ ☐
 - Hot Water ☒ ☐
 - Flush Toilet ☒ ☐
 - Bathroom ☒ ☐
 - Central Heating ☒ ☐
 - Heating Stove ☒ ☐
 - Mech. Refrigerator ☒ ☐
 - Electricity Installed ☒ ☐
 - Cooking Stove ☒ ☐
- If any equipment is shared, explain below:

2. SERVICES YES NO
- Garage ☒ ☐
 - Heat or Heating Fuel ☒ ☐
 - Cooking Fuel ☒ ☐
 - Cold Water ☒ ☐
 - Hot Water ☒ ☐
 - Light ☒ ☐
 - Ice or Refrigeration ☒ ☐
 - Janitor Service ☒ ☐
 - Garbage Disposal ☒ ☐
 - Painting & Decorating ☒ ☐
 - Interior Repairs ☒ ☐
 - Exterior Repairs ☒ ☐
- List any other services:

Are all equipment and services indicated above now included in the rent? Yes (X) No ()
If "No" you must also file Form DD-102-U.

WARNING

The rent for this dwelling unit on and after the "effective date" can be no more than the Maximum Rent entered in Section C, item 7, unless changed by order of the Rent Director (see Section C, item 8).
A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.
I HEREBY REPRESENT that all statements and entries given herein are true and correct.

John McCord
(Signature of Landlord or his Agent)

PLAINTIFF'S EXHIBIT No. 3

(Admitted in Evidence 2-10-48)

OPA Form D-34—United States of America. Office
of Price Administration

Stamp of Issuing Office: Los Angeles Defense
Rental Area, 1037 South Broadway, Los Angeles,
California.

ORDER DENYING PETITION

Concerning: All Units. Belmont Apartment Hotel,
948 So. Figueroa, Los Angeles, California. Docket
No. 53603 FFS/eg.

To: Mr. John McCord, Belmont Apartment Hotel,
948 So. Figueroa, Los Angeles. California.

The Rent Director has considered your petition
and, after due investigation of the matter, he finds
that the facts in your case do not entitle you to the
relief requested under Section 1(e) of the Rent Reg-
ulation. It is therefore ordered that said petition be,
and it hereby is, denied.

This order is without prejudice to the filing of an-
other petition if other facts can be shown which en-
title you to relief under the Rent Regulation.

Issued and effective Aug. 9, 1945. This order is
now in effect and will remain in effect until changed
by the Office of Price Administration.

/s/ B. C. KOEPKE,

Area Rent Director for the Los Angeles Defense-
Rental Area.

Note: According to the records of this office, the maximum rent for the above accommodations, unless changed by order of the Rent Director, remains Unchanged by this Order.

Form 8-R-LA-83 Rev. May 26, 1944

NOTICE OF VIOLATION

Docket No. 53603. Compliance Case No. 109568.

Landlord's name and address: Mr. John McCord.
Belmont Apartment Hotel, 948 So. Figueroa, Los Angeles, Cal.

Tenants name: Tenant-Occupants.

Address of housing accommodations: 948 So. Figueroa, Los Angeles, Cal.

* * * *

NATURE OF VIOLATION

Landlord's reason for violation: Landlord requested consent to come under the Hotel Regulation; after repeated request for required data, and many excuses and promises unfulfilled by Landlord, Examiner denied petition and advised landlord by letter to contact Compliance for reregistration under Housing Regulation.

Letter in Docket dated July 31, 1945.

Examining Section No. 17.

Date: August 3, 1945.

Rental Division—Examiners' Office
1037 So. Broadway, Los Angeles 15, California

Docket 53603

Mr. John McCord July 31, 1945
Belmont Apartment Hotel
948 So. Figueroa
Los Angeles, California

Dear Mr. McCord:

On May 26, we requested that you please furnish us with the daily data of your rentals during June, September and October, 1942, and April, 1945, and in reply you stated that you would supply this information and present it to us not later than June 8, 1945. To date, we have not received the requested information and are hereby denying your petition for consent to come under the Hotel Regulation.

Therefore, we request that you give this your immediate attention and contact the Compliance Section for reregistration under the Housing Regulation. It is imperative that you give this matter your immediate attention, as you will be in violation of overcharges.

Very truly yours,

B. C. KOEPKE,
Area Rent Director.

By Examiner Stewart.

FFS/eg

To Inspector:

5/2/44

Determine if properly registered on the Dh-D and spot check for comparable rents. Practice appears to have been monthly rentals with few weekly and few daily rates in practice.

Interview manager in apartment No. 210.

Vacated—now living in Hemet August 1943.

A. J. MORRIS

Please assign this to Miss Barnes.

Present mgr. in No. 611.

OPA Form D-28—United States of America, Office
of Price Administration

INSPECTOR'S CONFIDENTIAL REPORT

(a) Concerning: Belmont Apt. Hotel, 948 S.
Figueroa St., L. A.

* * * *

(d) Present address of maximum rent date tenant:
Amy Selen—Fr. 3461.

(e) Name and address of landlord: John V. McCord, 948 S. Figueroa Street, Los Angeles, Calif

* * * *

The Comparability Standard

1. Taking into account the location, type, size and quality of the dwelling units, what was the rental range for closely similar accommodations in the Defense Areas on:

* * * *

Remarks: Units placed on weekly basis as vacancy

occurs. Unit rentals throughout comparable on monthly basis.

* * * *

Date: 6/26/44.

/s/ RUTHMARY BARNES,

Signature of Inspector.

Other information required by Examiner: Revert to 3/1/42 rental and terms D 06 D registration except Nos. 203, 303, 403, 503, 603, 214.

Description of Structure

* * * *

(e) Number of stories: 6.

(f) Number of Dwelling Units in Structure: 85.

* * * *

D-28 SUPPLEMENT SHEET

For use by Inspectors only

85 units.

5 rooms with private bath: Nos. 203, 303, 403, 503, 603. 1 Bachelor, 214.

63 Single Apts., 2rm.: Balance of numbers. Balance complete liv. units.

16 Doubles, 3 rms.: Nos. 207, 210, 216, 212, 307, 310, 316, 407, 410, 416, 507, 510, 516, 607, 610, 616.

On percentage of Transient Guest: Weekly cleaning, 3 per wk., garbage, linen, service; tenants pay laundry. Type units.

Property does not qualify for DHD registration—Revert to 3/1/43 rental and term. Other than five

rooms and 1 bachelor, Nos. 203, 214, 303, 403, 503, 603.

Tenant 409, Frances O'Shea, tenant of March 1942 states units rented on a monthly basis as of 3/1/42. 210 now rented as Dal value \$55.00 per mo. for 3 persons (comp. all 10's). Weekly service.

[Hotel Ontario, Ontario, Calif. Letterhead]

[Stamp]: Jun 11 1945

[Stamp]: Postmarked June 5, Office of Price Administration, Rent.

Office of Price Administration June 5, 1945
Rental Division
1037 South Broadway
Los Angeles, California

Re Docket 53603

Gentlemen:

Referring to yours of May 26, 1945, sorry to advise that, inadvertently, this letter was held at the Belmont Apartment Hotel and only reached me recently.

The information requested is being prepared and should be in your hands not later than June 8th, 1945.

Hope that this unavoidable delay has not in any way jeopardized the case.

Yours very truly,

BELMONT APARTMENT HOTEL

By */s/* JOHN McCORD.

Rental Division—Examiners' Office
1037 So. Broadway, Los Angeles 15, Calif.

Docket 53603

Mr. John McCord
Belmont Apartment Hotel
948 So. Figueroa
Los Angeles, California

May 26, 1945

Dear Mr. McCord:

We wrote you requesting that you supplement your monthly charts for September, October, and June, 1942, and April, 1945, with additional information specifically covering each day of the months. To date we have not received this additional information, and are once again requesting that you give this your immediate attention and submit this within ten days from date.

Your failure to comply with this final request will necessitate our denying your petition for consent to come under the Hotel Regulation and will require that you re-register the property under the Housing Regulation.

Very truly yours,

B. C. KOEPKE,
Area Rent Director.

By Examiner No. 17.

FFS/eg

Rental Division—Examiner's Office
1037 So. Broadway, Los Angeles 15, Calif.

Docket 53603

Mr. John McCord
Belmont Apartment Hotel
948 So. Figueroa
Los Angeles, California

May 10, 1945

Dear Mr. McCord:

In reviewing the Chart submitted by you in respect to your request to Rent Director for consent to come under the Hotel Registration, we note that this chart does not specifically cover EACH day of the month, for the months of September, October and June, 1942; and the current month of April, 1945.

Kindly prepare a chart for the specific days of the above months, and submit within ten days, otherwise the lack of sufficient information may be cause for us to deny your petition.

Very truly yours,

B. C. KOEPKE,
Area Rent Director.

By Examiner No. 17

FFS/eg

OPA Form 560-10 (Formerly AD-8)

United States of America
Office of Price Administration

Ref. No. Docket 53603 FFS/eg April 10, 1945

To: Mr. John McCord, Belmont Apartment Hotel,
948 So. Figueroa, Los Angeles, California.

Will you kindly call at this office, Room 710, and confer with the undersigned Examiner in respect to the above Docket? Please make this call within the next five days—any day except Saturday, and refer at that time to the Docket involved.

EXAMINER No. 17

Rental Division—Examiner's Office
1037 So. Broadway, Los Angeles 15, Calif.
Docket 53603

Mr. John McCord March 13, 1945
Belmont Apartment Hotel
948 South Figueroa
Los Angeles, California

Dear Mr. McCord:

On February 16, 1945, we requested that you supplement the information we now have in the above Docket by furnishing us with an additional chart of your rentals for January, 1945. To date we have not received this chart.

To come under the Hotel Registration, it is necessary that we receive the chart for the rentals of the

CURRENT month; therefore, this final request that we are now making in respect to the supplemental information should apply to the PAST CURRENT month, and not as per request in our previous correspondence for January, 1945.

Unless we have the chart of rentals made for the PAST CURRENT MONTH within ten days from date of this letter, it will be necessary for us to deny your petition for lack of sufficient information to make a proper determination.

Very truly yours,

B. C. KOEPKE,
Area Rent Director.

By Examiner No. 17

FFS/eg

Rental Division—Examiner's Office
1037 So. Broadway, Los Angeles 15, Calif.

Docket 53603

Mr. John McCord
Belmont Apartment Hotel
948 South Figueroa
Los Angeles, California

February 16, 1945

Dear Mr. McCord:

We have before us your petition for consent to come under the Hotel Regulations.

We are also in receipt of the chart for the months

of June, September and October, 1942, and November, 1944. Once again, we respectfully request that you prepare this same chart for the month of January, 1945, and return as soon as possible so that we may act upon your petition before the close of this month.

Very truly yours,

B. C. KOEPKE,
Area Rent Director.

By Examiner No. 17

FFS/eg

Rental Division—Examiner's Office
1023 So. Broadway, Los Angeles 15, Calif.

Docket 53603

Mr. John McCord January 2, 1945
Belmont Apartment Hotel
948 South Figueroa
Los Angeles, California

Dear Mr. McCord:

Re: Belmont Apartment Hotel

On December 6, 1944, we sent you a questionnaire and asked you also prepare a chart. To date we have not received the foregoing, and request that you give this your immediate attention and forward the information to us within seven days from date.

Your failure to comply with this request will result in a violation for use of the hotel registration

without a consent and order granted by the Area Rent Director as required by the Regulations.

Very truly yours,

DAVID BARRY, JR.,

Area Rent Director.

By Examiner No. 17

FFS/eg

Rental Division—Examiners' Office
1023 So. Broadway, Los Angeles 15, Calif.

Docket 53603

Mr. John McCord
Belmont Apartment Hotel
948 South Figueroa
Los Angeles, California

December 6, 1944

Dear Mr. McCord:

Re: Belmont Apartment Hotel

Attached hereto is a questionnaire. We request that you answer the questions thereon at your earliest convenience.

In addition to the above, prepare a chart showing by days the term of occupancy that prevailed upon each room for the month of June, September, and October, 1942; and a chart of the most recent calendar month—in your case, we can use the month of November, 1944. This chart can be prepared on ruled paper, having at least 31 columns for the days and a column on the left for apartment numbers. Rooms and Bachelor Apartments need not be shown

on the chart, as we are only concerned with the house-keeping units. We suggest that colored crayons can be used to indicate by days whether the occupancy was, and now is, on weekly, daily, or monthly basis.

Very truly yours,

DAVID BARRY, JR.,
Area Rent Director.

By Examiner No. 17

FFS/eg

(8-R-LA) C-303

Office of Price Administration—Los Angeles
Defense Rental Area
1023 So. Broadway, Los Angeles, California

C 109568

Date 10-20-44

To: Mr. John McCord, Alessandro Hotel, Hemet,
Calif.

You are requested to appear within five days at Room 750, 1031 South Broadway, Los Angeles. A question of compliance with the Federal Rent Regulations is involved concerning Belmont Apt. Hotel, 948 S. Figueroa Ave., L. A. Please bring this notice, landlord's copies of the registration, evidence of the actual rental of March 1, 1942. or other maximum rent date, such as: Receipts, account books, statement from the tenant of that date, etc., or any correspondence from this office.

COMPLIANCE SECTION

EM:AMB

[Stamp]: Jul 20, 1944.

[Stamp]: Received Jul 14, 1944, Los Angeles, Office of Price Adm.

[Attached to letter]: Jul 21, 1944. Area File copy charged to Mr. Morris 4/8/44. Unable to locate at this date. Jul 21, 1944. Examiner check with Examining Section No. 11. D-6 petition docketed under Docket No. 58044. Sept. 16, 1944.

[In longhand]: Docket under Sect. 1E Hotel to No. 20. Morris 4/8/44.

[Belmont Apartments Letterhead]

Los Angeles Defense Rental Area July 12, 1944
Office of Price Administration

1023 South Broadway

Los Angeles 15, California

Attention: Mr. Fordham

Gentlemen:

When the writer took this property on July 1, 1941, he changed the name from the Belmont Apartments to the Belmont Apartment Hotel and immediately began to operate as a hotel property.

The Belmont Apartment Hotel has been operated on that basis continuously since July 1, 1941, and has had a transient occupancy amounting to as much as 56 per cent of the total occupancy.

We filed on Form DHD under the rent regulations and desire to continue operating under the rent regulations for hotels.

Yours very truly,

BELMONT APARTMENT HOTEL

By /s/ JOHN McCORD.

Fern: Chart submitted is not as per request. We want it to show each day of June, Sept., and Oct. 42 and most recent current month. This is a request for consent and we can not be too careful.

RDF

(Duplicate)

Date filed 7/12/44 Compliance Case No. 109568-B

Landlord's name and address: McCord, John, Alessandro Hotel, Hemet, Calif.

Address of Subject Housing: Belmont Apt. Hotel, 948 So. Figueroa Ave.

Classified by G. Burnes. Date 11-1-44.

Referred to Examiners. Date 11-1-44.

Dismissed by D. [illegible]. Date 11/6/44.

Reason for Dismissal or Withdrawal: Referred to Examiners at request of Miss Stewart.

[Signature illegible]

Instructions to Docket and File Clerks: Form No. C-303. Hold date: 10-27-44.

CHART

Belmont Apt. Hotel

948 So. Figueroa St., Los Angeles 15, Calif.

John McCord, Operator

1945. April 1st to 15th inclusive

201 ** ***	207 **	212 **	301 **
202 *	208 **	215 **	302 **
204 **	209 **	216 **	304 **
205 **	210 **	217 **	305 **
206 *	211 *	218 *	306 *

307 *	406 *	505 *	604 ** ***
308 **	407 **	506 *	605 **
309 *	408 **	507 **	606 **
310 *	409 **	508 **	607 **
311 **	410 *	509 **	608 *
312 **	411 **	510 **	609 *
314 *	412 *	511 **	610 **
315 **	414 **	512 *	611 Mgr.
316 **	415 *	514 *	612 *
317 **	416 *	515 *	614 *
318 **	417 **	516 *	615 **
401 *	418 *	517 **	616 *
402 *	501 *	518 *	617 *
404 *	502 **	601 *	618 **
405 ** ***	504 **	602 **	

* Monthly. ** Weekly. *** Daily.

45 Weekly. 3 Daily. 33 Mo.

QUESTIONNAIRE

Total number of dwelling units: 85.

Number of housekeeping apartments: 79.

* * * *

Number of housekeeping apartments vacant, owner-occupied, or employee-occupied during the entire month of September and October, 1942: 1 Manager.

Services, if any, peculiar to hotel operations: Laundry service, valet service, 24-hour switchboard service, cleaning.

Membership, if any, in hotel associations: So. Cal. Hotel Assn.

PLAINTIFF'S EXHIBIT No. 4

(Admitted in Evidence 2-10-48)

Los Angeles Defense Rental Area
1037 So. Broadway, Los Angeles 15, California

8R:LA:JRC(c)

September 5, 1945

Mr. John McCord
Hotel Ontario
Ontario, California

Compliance Case No. 130081
Belmont Apartment Hotel
948 South Figueroa Street, Los Angeles

Dear Sir:

Confirming our telephone conversation today, we are requesting that you or your representative call at this office within seven days from the date of this letter for the purpose of re-registering the subject housing accommodations, known as the Belmont Apartment Hotel, under the Housing Regulations, the property at this time being improperly registered under the Hotel Regulations.

Further confirming our telephone conversation of this date, it is our understanding that you are on this date instructing your manager, Mrs. Ross, to permit the tenants Mr. and Mrs. William Everett, to regain possession of their apartment from which they were wrongfully excluded there having been no compliance with the Housing Regulations by you or your manager in the evicting of said tenants.

Your failure to call at this office within the aforesaid time, and to properly register the premises, will result in the matter being referred to the Enforcement Division for immediate legal action.

Very truly yours,

JAMES R. CARNES.

District Rent Compliance Attorney.

cc. Mr. McCord at the above address.

[Marginal note in longhand]: Motion re eviction held in closed compliance case.

No. 12039

**In the United States Court of Appeals for the
Ninth Circuit**

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT

v.

JOHN MCCORD AND FLORENCE MCCORD, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

APPELLANT'S BRIEF

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

BENJAMIN I. SHULMAN,

Special Litigation Attorney,

*Office of the Housing Expediter, Office of the General Counsel,
4th and Adams Drive SW., Washington 25, D. C.*

FILED

FEB 28 1949

PAUL P. O'BRIEN

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In the United States Court of Appeals for the Ninth Circuit

No. 12039

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

JOHN McCORD AND FLORENCE McCORD, APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

This is an appeal by the Housing Expediter from a final judgment of the United States District Court for the Southern District of California, Central Division, denying restitution of alleged rent overcharges collected in violation of the Emergency Price Control Act, as amended,¹ (50 U. S. C. A. App. 901, et seq.), and of the regulation issued pursuant thereto, the Rent Regulation for Housing² (10 F. R. 13528),

¹ Hereinafter referred to as the "Act."

² Hereinafter referred to as the "Regulation."

in an action brought by the Housing Expediter pursuant to Section 205 (a) of the Act.³ Judgment was entered on April 30, 1948 (R. 47). Notice of appeal was filed on June 28, 1948 (R. 47). The jurisdiction of this Court is invoked under Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and regulations appear in the Appendix.

FACTS

The material facts in this case are not in dispute. Defendants were the owners and landlords of housing accommodations located at 948 South Figueroa Street, Los Angeles, California, known as the Belmont Apartments, within the Los Angeles Defense-Rental Area. As such, these premises were subject to the Act and the regulations issued thereunder. Under the regulations, the maximum rent for any housing accommodation is the rent in effect on the maximum rent date (See § 1388.284 (a) of Maximum Rent Regulation 53, Appendix, *infra*, p. 31; § 4 (a) of the Rent Regulation for Housing, Appendix, *infra*, p. 33 and § 825.4 (a) of the Controlled Housing Rent Regulation, Appendix, *infra*, p. 33).

On or about December 15, 1942, defendants filed with the Office of Price Administration a registration statement for the Belmont Apartments on the form

³ Although the complaint sought treble damages under Section 205 (e) (R. 2), in addition to restitution under Section 205 (a) of the Act, plaintiff did not pursue and abandoned its prayer for statutory damages under Section 205 (e).

designated for use by hotels and rooming houses (R. 23, 24, Plaintiff's Exhibit 1, R. 78). The accommodations should have been registered under the housing regulation then in effect⁴ unless they qualified for registration under the then operative hotel and rooming house regulation.⁵ At that time all housing accommodations in the Los Angeles Defense-Rental Area were subject to Maximum Rent Regulation 53 under § 1388.281 (a) of that regulation (Appendix, *infra*, p. 30) unless specifically exempted by § 1388.281 (b) (Appendix, *infra*, p. 31). The latter section exempted from Maximum Rent Regulation 53 "rooms or other housing accommodations within hotels or rooming houses" provided that the express consent of the Administrator had been obtained. "Hotels" were defined by the regulation in terms of rooms "used predominantly for transient occupancy" (§ 1388.293 (a) (11), Appendix, *infra*, p. 31) and "rooming house" in terms of "rooms not constituting an apartment" which were rented on a short term basis (§ 1388.293 (a) (12), Appendix, *infra*, p. 31). According to defendant's own testimony, the majority of the units in the particular premises had neither been rented prior to nor on the freeze date on a transient basis (R. 81). Defendant also testified that seventy-nine out of the total of eighty-five units comprising the Belmont Apartments were self-contained units with bath and

⁴ Maximum Rent Regulation 53, "Housing Accommodations Other Than Hotels and Rooming Houses," Vol. 7, No. 210, Fed. Reg. at p. 8596 (Oct. 24, 1942).

⁵ Maximum Rent Regulation 54A, "Hotels and Rooming Houses," Vol. 7, No. 210, Fed. Reg. at p. 8602 (Oct. 24, 1942). Defendants filed originally under this regulation.

kitchen facilities, that is, apartments. The foregoing facts were confirmed by plaintiff's inspection of the premises (R. 122). Moreover, the consent of the Administrator to register under the hotel and rooming house regulation was not obtained by defendants (R. 93), as expressly required by the regulation. Nevertheless, as shown above, defendants registered their accommodation on the form used for hotels and rooming houses. The rents which defendants could lawfully collect for the accommodations under the hotel regulation on a transient basis greatly exceeded the rents which could lawfully be obtained for them on a monthly basis under the housing regulation.

In July 1944, John McCord advised the Office of Price Administration by letter that he had been operating under the hotel and rooming house regulation and requested permission to continue to operate under that regulation (Plaintiff's Exhibit 3, R. 132). Plaintiff then endeavored to obtain from defendants information concerning their rental practices during the base period for the particular accommodations in order to ascertain the propriety of their registration. Beginning with a request dated October 20, 1944, to defendant McCord to supply evidence of his base period rentals (Plaintiff's Exhibit 3, R. 131), plaintiff wrote to defendant without success on eight different occasions seeking to obtain the requested data.⁶ Finally,

⁶ While plaintiff's unsuccessful attempts to elicit the requested information are fully discussed *infra*, pp. 18-22 under Point III, the eight letters dispatched by plaintiff to defendant are as follows:

- (1) October 20, 1944, Request for information (R. 131).
- (2) December 6, 1944, Request for information with questionnaire (R. 130).

on August 9, 1945, a formal order was issued by the Area Rent Director denying defendants' petition for registration under the hotel regulation (Plaintiff's Exhibit 3, R. 119). No administrative review of this order was ever sought by defendant. This order, too, was ignored by defendants as well as plaintiff's subsequent letter of September 9, 1945, directing defendants to re-register under the housing regulation (Plaintiff's Exhibit 3, R. 135).

On December 13, 1945, plaintiff filed an injunction suit to compel re-registration (R. 31, 92). As a result of the injunction suit (R. 31), defendants re-registered the premises on February 14, 1946, under the housing regulation (Plaintiff's Exhibit 2, R. 117). The re-registration statements accurately reported the rents collected by defendants on the maximum rent date (Par. 8-25 of Plaintiff's Request for Admissions, R. 8-12, Defendant's Answer thereto, R. 18).

This suit was filed by plaintiff on March 27, 1947 (R. 7), under Section 205 (a) of the Act seeking restitution to the tenants of the alleged excessive rents collected by defendants during the period from November 1943 to March 1946 on the basis of the transient rentals contained in its first registration. A

(3) January 2, 1945, Follow-up on December 6 letter (R. 129).

(4) February 16, 1945, Request for additional information (R. 128).

(5) March 13, 1945, Follow-up on February 16 letter (R. 127).

(6) April 10, 1945, Requesting McCord to confer with OPA (R. 127).

(7) May 10, 1945, Request for information (R. 126).

(8) May 26, 1945, Follow-up requesting information (R. 125).

statement of the several units, tenants, maximum legal rents, amounts of rents actually collected, periods of overcharges and total overcharges, was made a part of the complaint (R. 6-7). Defendants' answer denied the overcharges; pleaded the one-year statute of limitations in Section 205 (e); asserted that the violations were not wilful or the result of failure to take practicable precautions against the commission thereof; and that plaintiff was not authorized to prosecute the action (R. 8-9).

Plaintiff requested defendants to admit that the rents filed by defendants on February 14, 1946, upon the re-registration of the premises reported the true freeze date rents on the particular premises (Plaintiff's Request for Admissions, Par. 8-25, R. 12-16). This was admitted by defendants (Defendants' Answer to Plaintiff's Request for Admissions, R. 18). Plaintiff further requested defendants to admit the allegations of the complaint enumerating the rents actually paid, the periods of overcharges and the names of the tenants overcharged (Plaintiff's Request for Admissions, Par. 27-28)^{R. 16}. All these were also admitted by defendants except as to overcharges alleged beyond March 22, 1946,⁷ and as to the overcharges alleged for Units Nos. 207, 210, 304, 407, 510, and 511 for the period from November 1943 to March 1946 for which defendants had already made reimbursement to the tenants⁸ (Defendant's Answer to Plaintiff's

⁷ The complaint alleged no overcharges beyond March 22, 1946 (see Schedule of Overcharges, Appendix, *infra*, p. 36). Accordingly, defendants' failure to admit overcharges beyond that date is wholly lacking in relevancy.

⁸ At the trial, plaintiff stipulated that the seven overcharges alleged in the complaint with respect to these six units be stricken on

Request for Admissions (R. 18-19)). Thus all of the overcharges as alleged in the complaint, with the exception of the seven violations for which defendants had already made reimbursement to the tenants, were fully admitted by defendants even prior to trial.

At the trial of the cause, the alleged overcharges were further corroborated by the testimony of defendant Florence McCord. She testified that most of the accommodations were rented during the freeze period on a monthly basis (R. 81) as evidenced by the second registration statements (R. 117, 119) and not at the transient rates contained in the first registration.⁹ Mrs. McCord testified further that defendants had rented the accommodations during the period between December 15, 1942, the date of the first registration, and February 14, 1946, the date of the second registration, on the basis of the transient rates specified in the first registration (R. 78).

the basis of restitution in the amount of \$3,428.48 of the overcharges by the defendants to the tenants as follows (R. 66) :

(1) Unit 207, H. Herrmann (alleged overcharge \$608.52).

(2 and 3) Unit 210, Allen D. Bull (alleged overcharges \$196.80 and \$970.20).

(4) Unit 304, M. P. Anderson (alleged overcharge \$55.00).

(5) Unit 407, Fern Boltz (alleged overcharge \$535.35).

(6) Unit 510, Eileen J. Meloy (alleged overcharge \$908.85).

(7) Unit 511, H. H. Tubbs (alleged overcharge \$149.76).

As a result of the repayment by defendants of \$3,428.48 to the tenants, a total of \$2,106.24. remained in issue in this suit (R. 6, 7).

⁹ This testimony corroborated defendants' answer to the same effect made to plaintiff's Request for Admissions, that the rentals specified in the second registration statements truthfully depicted the actual rents collected on the maximum rent date (Par. 8-25 of Plaintiff's Request for Admissions, R. 12-16, Defendants' Answer thereto, R. 18).

Despite this unqualified admission of overcharges both prior to and at the trial, the District Court rendered judgment in favor of defendants. It entered Findings of Fact which in pertinent part are as follows (R. 43-45):

* * * * *

(1) Finding of Fact III found to be untrue the allegations contained in paragraph VI of the complaint, that the defendants received rents in excess of the maximum rents established by the Rent Regulation.

* * * * *

(2) Finding of Fact VIII found that the action had been barred by the one-year statute of limitations provided for in Section 205 (e) of the Act.

(3) Findings of Fact IX found that defendants' actions were neither wilful, fraudulent nor the result of failure to take practical precautions.

(4) Finding of Fact X found that plaintiff had been guilty of unreasonable delay in filing suit and that defendants had been irreparably injured thereby.

(5) Finding of Fact XI found that plaintiff should be denied relief because of delay and irreparable injury to defendants.

(6) Finding of Fact XII found that defendants were not violating the law and that the Court should not exercise its equitable jurisdiction nor order restitution.

(7) Finding of Fact XIII found that defendants were not guilty of fraud or concealment and that plaintiff had been guilty of such

delay as to make it inequitable to make any other order against defendants.

In all of these respects, the Court below was in error. In the argument that follows, we will consider all of these Findings in the above order except that Findings X, XI, and XIII will be considered together since each of these Findings relate to the charge that the Expediter was guilty of unreasonable delay in prosecuting this suit.

SPECIFICATIONS OF ERROR

1. The lower Court erred in holding that defendants did not charge rentals in excess of the maximum rentals established by the rent regulation.

2. The lower Court erred in holding that the one-year statute of limitations provided for in Section 205 (e) of the Act barred restitution in an action brought by the Housing Expediter under Section 205 (a) of the Act.

3. The lower Court erred in holding that plaintiff should be denied relief because of its unreasonable delay in filing suit and because of irreparable injury to defendants.

ARGUMENT

I

The lower Court erred in holding that defendants did not charge rentals in excess of the maximum rentals established by the rent regulation

The District Court found that "the allegations contained in paragraph VI of Plaintiff's Complaint are untrue" (Finding of Fact III, R. 43). Inasmuch as paragraph VI of the complaint contained the allegations as to overcharges, the lower Court's finding was

to the effect that there were no overcharges in the case. This finding is wholly inconsistent with the applicable provisions of the rent regulation and ignores defendants' admissions of overcharges made both prior to and at the trial. It is submitted that this finding is error.

It should be pointed out at the outset that the maximum rent which a landlord is permitted to charge is not determined by the registration statement filed by him with the Expediter. Maximum rents for housing accommodations rented on the maximum rent date are the rents actually charged for the accommodations on the maximum rent date (see § 1388.284 (a) of Maximum Rent Regulation 53, Appendix, *infra*, p. 31; § 4 (a) of the Rent Regulation for Housing, Appendix, *infra*, p. 33; and § 825.4 (a) of the Controlled Housing Rent Regulation, Appendix, *infra*, p. 33).

Therefore, to determine what the maximum legal rents were for the particular accommodations, we must ascertain the rents in the base period. The true picture of defendants' rentals during the crucial base period was portrayed in the re-registration statements filed on February 14, 1946, under the housing regulation. This fact was admitted by defendants in their answer to plaintiff's request for admissions (R. 18, Par. 8-25 of Plaintiff's Request for Admissions, R. 11-16). By their answer, defendants admitted that the monthly rentals specified in their second registration, not the transient rentals set forth in their first registration, were the rents actually in effect on the maximum rent date in 1942. These rents, then, became the maximum legal rents under the regulation.

Consequently, if the overcharges had not already been admitted by defendants prior to the trial, the testimony of defendant, Mrs. McCord, at the trial, that during the period between the first registration in December 1942 and the second registration in February 1946, the rents collected from the premises were the transient rentals specified in the first registration (R. 78), would have established the overcharges alleged. However, as discussed *supra*, p. 6, the specific overcharges as alleged in the complaint had already been admitted by defendants in their answer to plaintiff's request for admissions (R. 18).

In view of the formula set forth in the regulation for determining maximum rents and in view of defendants' admissions both prior to and at the trial, there can be no question of overcharges in this case. Only by refusing to accept the freeze date concept of maximum rents specified in the regulation, could the lower Court have arrived at its conclusions that there were no overcharges. Of course, the District Court was bound to give full effect to the regulation in all respects and for all purposes (*Woods v. Stone*, 333 U. S. 472, 68 S. Ct. 624; *Woods v. Hills*, 334 U. S. 210, 68 S. Ct. 992; *Shyman v. Fleming*, 163 F. 2d 461 (C. C. A. 9), certiorari denied 332 U. S. 844, 68 S. Ct. 266; *Fleming v. Dashiell*, 161 F. 2d 612 (C. C. A. 9); *United States v. Rosenzweig*, 144 F. 2d 30 (C. C. A. 9), certiorari denied 323 U. S. 764, 65 S. Ct. 117; *Taylor v. Bowles*, 147 F. 2d 824 (C. C. A. 9); *Bowles v. Sanden & Ferguson Co.*, 149 F. 2d 320 (C. C. A. 9)). In *Shyman v. Fleming*, *supra*, where appellant argued that the Administrator was without power to establish maximum

prices by the formula set forth in the regulation, this Court stated as follows (at p. 463):

A short answer to the argument is that it amounts to an attack on the validity of the regulation cognizable only in the Emergency Court of Appeals.

Futhermore, the failure of the District Court to find overcharges in the case not only repudiates defendants' admissions to the contrary and the formula in the regulation for establishing maximum rents, but constitutes an attack upon the validity of the August 9, 1945 Order of the Area Rent Director denying defendants' petition to come under the Hotel and Rooming House Regulation. No administrative appeal was ever taken by defendants from this Order, even though ample provision for administrative review of the order was made in Sections 1300.209 (a) and 1300.215 of Revised Procedural Regulation 3 (Appendix, *infra*, p. 34). The finding of no violations by the lower Court is obviously based upon the proposition that the first registration was proper. Such a holding necessarily denies any affect whatsoever to the August 9 Order of the Area Rent Director, the conclusiveness of which was binding upon that Court (*Woods v. Stone, supra; Woods v. Hills, supra*; see, too, cases decided by this Court, *supra*, p. 11).

Nor could the filing of the improper registration in December 1942 confer any greater rights on defendants than if they had filed a proper registration at that time. To accept the view that an improper registration statement filed by a landlord establishes lawful rentals, would place a premium upon misinforma-

tion. Under the regulation the landlord is required, for information purposes only, to specify in the registration the rents in effect during the base period. But regardless of what he states in his registration, maximum rents are and have always been defined in the rent regulations as the rents actually in effect for the accommodations on the maximum rent date. As the Court of Appeals for the Second Circuit recently said in *Woods v. Forest Hills South, Inc.*, No. 21172, decided January 11, 1949, as yet unreported, speaking through Judge Hand:

The [registration] certificates in no way bind the Housing Expediter and at best can only furnish ex parte information on which corrective measure may be used.

And as the Court of Appeals for the First Circuit said in *Kalwar v. McKinnon*, 152 F. 2d 263 through Judge Magruder (at p. 263):

If he specifies it incorrectly, he does not thereby establish the maximum rent at the asserted figure.

See too, *Saker v. Woods*, 169 F. 2d 131, 134 (E. C. A.).

On the basis of the foregoing, it is clear that the District Court erred in holding that defendants were not guilty of collecting excessive rents.

II

The lower court erred in holding that the one-year statute of limitations provided for in Section 205 (e) of the Act barred restitution in an action brought by the Housing Expediter under Section 205 (a) of the Act

The District Court found as a fact (Findings of Fact VI and VIII, R. 43, 44) that the instant action

was barred by the expiration of the statute of limitations in Section 205 (e). This holding is directly opposed to that of two Circuit Courts of Appeals on the precise issue (*Co-efficient Foundation, Inc. v. Woods*, 171 F. 2d 691 (C. C. A. 5); *Creedon v. Randolph*, 167 F. 2d 918 (C. C. A. 5); *Blood v. Fleming*, 161 F. 2d 292 (C. C. A. 10)).

In *Co-efficient Foundation, Inc. v. Woods, supra*, the Court of Appeals for the Fifth Circuit, in affirming a judgment of restitution under Section 205 (a) and of double damages recovered under Section 205 (e), ruled squarely that the statute of limitations provided in Section 205 (e) did not apply to an action under Section 205 (a), as follows:

The period of limitations provided by Section 205 (e) could have been invoked only as to the recovery sought under that subsection. There is no period of limitation prescribed by subsection [205] (a) and the limitation set in 205 (e) cannot be made applicable to the equitable action under subsection [205] (a).

Nor has any decision been handed down by any other Circuit Court on the particular issue which sustains the District Court holding in this case. Thus, the decision of the lower Court, that the statute of limitations in Section 205 (e) bars restitution in an action brought under 205 (a) of the Act, is contrary to all Federal appellate authority.

The lower Court further manifested its basic misconception of the wholly distinct remedies provided in Section 205 (a) and Section 205 (e) of the Act. After

stating in its oral opinion that the recovery sought was for the benefit of the tenants and that they "could themselves have brought suit" (R. 103), the Court denied restitution to the Expediter stating that "they [the tenants] did not have to wait for the Administrator to bring action" and that they had failed to sue for statutory damages under Section 205 (e) within the one-year period therein provided (R. 105).

As discussed, *supra*, restitution under Section 205 (a) is in no wise limited by the one-year statute of limitations contained in Section 205 (e) of the Act. Equally true is the fact that the right of the Expediter to compel restitution under Section 205 (a) is wholly separate and distinct from the right granted to tenants to recover damages under Section 205 (e). When the Expediter applies for an order of restitution to compel compliance with the Rent Control Act, he seeks the vindication of public rights, not the redress of a private wrong. On the other hand when an aggrieved tenant seeks damages under Section 205 (e), he seeks the vindication of a private right bestowed upon him by the statute, not the redress of a public wrong. "The Administrator acts in the public interest—the purchaser his own. The remedies are not irreconcilable"¹⁰ (*Bowles v. Skaggs*, 151 F. 2d 817, 821 (C. C. A. 6)).

¹⁰ Compare also the reasoning of the Supreme Court in *McComb v. Jacksonville Paper Co.*, No. 110, Oct. term, 1948, decided Feb. 14, 1949, 17 L. W. 4200, involving a proceeding by the Administrator of the Fair Labor Standards Act (52 Stat. 1060) to enforce civil contempt. As the Court there stated, "The fact that another suit might be brought [by employees] to collect the payments is, of course, immaterial" (at p. 4201).

Likewise in *Creedon v. Randolph, supra*, the Fifth Circuit Court of Appeals repudiated the position of the lower Court in this case, by stating as follows (165 F. 2d at p. 919):

The remedy invoked under Sec. 205 (a) appertains only to the Administrator as the representative of the Government in the enforcement of this law. That to require restitution of overcharges tends to enforce the law prohibiting them no one would deny. That it operates to confer a benefit on the tenant, who has not seen fit to act in her own behalf, does not detract at all from the enforcement effect nor alter its nature.

To the same effect, *Woods v. Schmid*, 164 F. 2d 981 (C. C. A. 5); *Creedon v. Evangelista*, 77 F. Supp. 538 (E. D. Pa.).

Moreover, it is well established that even where the beneficiary under a statute designed to vindicate the public interest knew of the violation, recovery from the defendant is not barred (*Rosenberg v. Hano*, 121 F. 2d 818, 821 (C. C. A. 3); *Washington & C. Ry. Co. v. Mobile & O. R. Co.*, 255 F. 12 (C. C. A. 5); *Lewis v. Nailling*, 36 F. Supp. 187 (W. D. Tenn. 1940)). Thus, in *Washington & C. Ry. Co. v. Mobile & O. R. Co.*, *supra*, where recovery of an overcharge under the Interstate Commerce Act was sought, it was held that plaintiff's knowledge that its overpayments were in violation of the law, was no bar to recovery. The Court stated (at p. 15):

Tariffs and divisions would be rendered nugatory, if the interested companies could, by repayments and readjustments of accounts, bring

about any result they might desire as between themselves and connecting lines, or between themselves and shippers.

Since the action authorized under Section 205 (a) of the Act is clearly one to enforce compliance with the Act and to promote the public interest in the maintenance of rent control (*Porter v. Warner Holding Co.*, 328 U. S. 395), the failure of the tenants to prosecute their private action under Section 205 (e) of the Act, obviously has no bearing on the suit of the Expediter to enforce compliance under Section 205 (a). Thus, it is clear that neither the statute of limitations under Section 205 (e) nor the failure of the tenants to seek restitution, were a bar to relief under Section 205 (a) in this case.

III

The lower court erred in holding that plaintiff should be denied relief because of its unreasonable delay in filing suit and because of irreparable injury to defendants

In Findings of Fact X, XI, and XIII, the District Court found that plaintiff was guilty of such unreasonable delay, and that defendants had relied thereupon to their irreparable injury, as to be barred by laches from recovery (Findings of Fact X, XI, XIII, R. 44-45.)¹¹ It is submitted first, that the delay in prose-

¹¹ X. It is true that plaintiff has been guilty of unreasonable delay in making the charges against defendants and proceeding thereon, and that defendants have been greatly and irreparably injured and harmed thereby.

XI. It is true that plaintiff should be denied relief because of delay and great and irreparable injury to defendants.

XIII. It is true that defendants are not guilty of fraud or concealment, and that plaintiff has been guilty of such delay as would

cuting this suit is directly traceable to defendants' actions and not to plaintiff's inaction; second, that defendants did not rely upon any action or inaction of plaintiff to their irreparable injury; and third, that the Office of the Housing Expediter is not subject to the doctrine of laches.

A. The evidence in the case clearly demonstrates that any delay involved in prosecuting this suit was occasioned by defendants.

Defendants filed their original and improper registrations on December 15, 1942 (R. 23, 24). Like millions of other registrations filed in 1942 throughout the United States, that of defendants remained unquestioned in the files. Usually because of the large number of registrations (there are about 15,000,000 housing accommodations under rent control) an improper registration remains undetected until specific occasion arises to examine it. As the District Judge properly pointed out, "The government had a right to assume that anybody who made a registration made an honest registration and it was not until their attention was called to the fact that possibly the registration was incorrect, were they required to act" (R. 104).

The first occasion the government had to question and examine the particular registration occurred as a result of a letter written by defendant, John McCord, some two years after filing thereof. For some unexplained reason he advised plaintiff by letter on

cause it to be inequitable to make any other order against defendants.

July 12, 1944, that he had been operating under the hotel regulation and requested permission to continue to do so (Plaintiff's Exhibit 3, R. 132). Shortly thereafter, on October 20, 1944, defendant was requested by letter to appear at the Los Angeles Area Rent Office with all data necessary to determine the propriety of his original registration (R. 131). Defendant ignored this notice. Another letter was addressed to defendant on December 6, 1944, by plaintiff enclosing a questionnaire and requesting detailed data as to the rental practices with respect to the premises for the months of June, September, and October 1942 and for the most recent calendar month (R. 130-131). This letter was likewise ignored by defendant. On January 2, 1945, a third letter was sent to defendant requesting the same information and pointing out that "failure to comply with this request will result in a violation for use of the hotel registration without a consent and order granted by the Area Rent Director as required by the Regulations" (R. 129, 130). Although the last letter elicited a reply from defendant, the information submitted was incomplete and on February 16, 1945, a fourth letter was sent to defendant requesting complete data (R. 128, 129). No reply having been forthcoming, a fifth letter was sent by plaintiff on March 13, 1945, as a follow-up (R. 127, 128). A sixth letter was sent to defendant on April 10, 1945, requesting him to call at the Area Rent Office with respect to the premises (R. 127). This, too, was ignored and on May 10, 1945, a seventh letter was sent to defendant seeking the same information requested

in the earlier letters (R. 126). No answer having been received, an eighth letter was sent to defendant on May 26, 1945, as a follow-up (R. 125). Defendant McCord finally responded on June 5, 1945, stating that the requested information would be forwarded by June 8 and expressing his hope "that this unavoidable delay has not in any way jeopardized the case" (R. 124). The requested data was not received by plaintiff by June 8, 1945, or at any other time (R. 120). Since the oft-requested information was not forthcoming from defendant, an inspection was made by plaintiff of the premises and the inspector's report concluded that the premises should have been registered under the housing and not under the hotel regulation (R. 122, 123, 124). On July 31, 1945, plaintiff addressed its ninth letter to defendant advising him that his petition for consent to come under the hotel regulation had been denied and directing him to re-register under the housing regulation (R. 121). Consistent with his conduct for the preceding ten months, no action was forthcoming from defendant. On August 9, 1945, a formal order was issued by the Area Rent Director denying defendant's petition (R. 119).

The foregoing chronology of events speaks for itself. It places the blame for the "unavoidable delay" (R. 124), employing the language of defendant in describing his own actions, squarely in the lap of defendant. But defendant's procrastination did not cease at this point. His failure to supply the data requested of him on eight different occasions was fol-

lowed by his failure to re-register the premises, as directed by plaintiff's letter of July 31, 1945 (R. 121), and as required by the August 9 Order of the Area Rent Director. Consequently, on September 5, 1945, another letter was sent to defendant directing him to re-register the premises (R. 135). This, too, was ignored. Finally, on December 13, 1945, an injunction suit was filed in the Los Angeles Superior Court by plaintiff in order to compel re-registration by defendant (R. 41). Shortly thereafter, on February 14, 1946, defendant registered under the housing regulation (Plaintiff's Exhibit 2, R. 117, 118). In other words, it took the prodding of the Expediter over a period of one and one-half years and a court proceeding to bring about defendant's compliance with the registration requirements of the regulation.

It is submitted that the foregoing chronology of events which occurred prior to the institution of the suit establishes that the delay therein involved was manifestly attributable to defendants' rather than to plaintiff's actions. By their failure to answer the several letters addressed to them seeking information essential to the determination of the propriety of the original registration, by their ignoring of the Area Rent Director's order of August 9, 1945, by their failure over an extended period of time to file an appropriate registration in accordance with the Area Rent Director's order which necessitated the filing of an injunction suit by the Office of Price Administration to compel compliance, defendants successfully prevented the early institution of suit by the Housing

Expediter. It is unconscionable that plaintiff should be penalized for these obstructionist tactics.¹² As this Court stated in *Northern Pac. Ry. Co. v. Boyd*, 177 F. 804, affirming 170 F. 779, and affirmed 33 S. Ct. 554, 228 U. S. 482 (at p. 824), "Where the party interposing a defense of laches has contributed to or caused the delay, he cannot take advantage of it. 5 Pomeroy's Eq. Jur. § 35." To the same effect, *Spiller v. St. Louis & S. F. R. Co.*, 14 F. 2d 284, 288 (C. C. A. 8), reversing 288 F. 612, and certiorari granted 47 S. Ct. 111, 273 U. S. 680, affirmed in part and reversed in part 47 S. Ct. 635, 274 U. S. 304.

B. *Defendants did not rely upon any action or inaction of plaintiff to their irreparable injury, but any injury sustained by them was self-inflicted.*

As discussed *supra*, any delay involved in prosecuting this suit is directly traceable to defendants' actions and not to plaintiff's inaction. Thus, the first prerequisite of laches is not present in the case. In addition, defendants cannot satisfy the second requirement which must be met if the equitable doctrine of laches is to obtain. This condition precedent to the application of the defense of laches was expressed by

¹² The considerations underlying the decision in *Woods v. Stone*, *supra*, where effect was given to the retroactive orders to prevent a landlord from benefiting from his own delay or inaction in filing a registration, applies with equal force here where appellants filed an improper registration. See also, similar rule applied where retroactive orders were issued in cases involving commodities for which price schedules were filed unseasonably (*Porter v. Senderowitz*, 158 F. 2d 435 (C. C. A. 3), certiorari denied, 330 U. S. 848; *Porter v. Kramer*, 156 F. 2d 687 (C. C. A. 8); *Martini v. Porter*, 157 F. 2d 35 (C. C. A. 9), certiorari denied, 330 U. S. 848; *Porter v. Eastern Sugar Associates*, 159 F. 2d 299 (C. C. A. 4)).

this Court in *London & San Francisco Bank v. Dexter Horton & Co.*, 126 F. 593 (C. C. A. 9), certiorari denied 24 S. Ct. 856, 194 U. S. 631, as follows (at p. 601):

No hard and fast rule has been laid down by the courts which can be said to govern all cases wherein the defense of laches is invoked. The lapse of time which might induce the application of the doctrine is not a determined period, but depends upon the circumstances of the particular case. One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that, by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced. *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Halstead v. Grinnan*, 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495; *Wheeling Bridge & T. Co. v. Reymann Brewing Co.*, 61 U. S. App. 531, 90 Fed. 189, 32 C. C. A. 571.

It is submitted that there was no change in condition or position suffered by defendants between the dates of the filing of the original registration in 1942 and the institution of this suit in 1947, which would render inequitable the enforcement of plaintiff's claim.

Certainly, as the District Court pointed out (R. 104), during the period from December 15, 1942, the date of first filing, and July 12, 1944, the first occasion plaintiff had to question the registration, plain-

tiff "had a right to assume that anybody who made a registration made an honest registration" (R. 104). Moreover, the complaint alleges and plaintiff seeks only to recover for excessive rents collected during the minor portion of this period (See Schedule of Overcharges, Appendix, *infra*, p. 36).

In the period that followed, from July 12, 1944, until plaintiff filed suit in March 1947, plaintiff certainly did not sleep on its rights nor take any action which would make recovery inequitable. It is abundantly clear from the record, as discussed *supra*, that every effort was expended by plaintiff during this period in obtaining the data, peculiarly within defendants' knowledge, necessary to determine the propriety of the original registration. It is equally clear that during this period defendant successfully withheld the requisite information, whether intentionally or otherwise, and never did submit it. Moreover, even after defendants' petition was denied by the order of the Area Rent Director, and they were directed to re-register the premises, it required a Court action to obtain re-registration (R. 141).

Implicit in defendants' request, contained in their letter of July 12, 1944, for permission to continue to operate under the hotel regulation, is the fact that until such request was granted they were operating at their peril. When we add to this proposition, the fact that defendants were solely responsible for any delay involved in the ultimate denial of their petition, their culpability is even more apparent. Finally, after they had been formally apprised of the denial of their request to come under the hotel regula-

tion, on August 9, 1945 (R. 119), as they had been earlier informally advised (R. 121), defendants wilfully ignored the order of the Area Rent Director and continued to charge the excessive rentals specified in their first improper registration. This last fact should dispel any doubt as to the reliance which defendants placed upon any action or inaction of the Expediter in this case. The fact is, as must be clear from the discussion above, that defendants misconduct was wholly independent of and not explainable in terms of anything the Expediter did or failed to do. Manifestly, then, the return of the illegal sums collected in such blatant disregard of the law can hardly be described as inequitable. "Appellant was not entitled to receive the amount of the overcharge in the first place and he may not now retain it on the ground of estoppel", *Diven v. Porter*, 157 F. 2d 593 (C. C. A. 8). To the same effect: *Shyman v. Fleming*, *supra*; *Kessler v. Fleming*, 163 F. 2d 464 (C. C. A. 9). The principle expressed above, even though in a suit under Section 205 (e) of the Act, has equal application in a suit under Section 205 (a).

With the foregoing facts in mind, it is difficult to follow the reasoning of the Court below in denying restitution of the overcharges on the basis of a change in possession and the payment of income taxes (R. 105). While the sale of the premises would be relevant on an issue such as injunctive relief, it is hardly relevant to the issue of restoration of overcharges admittedly collected; nor does it appear that the payment of income taxes, upon the facts, merits retention by defendants of their ill-gotten gains. If this were

true, the larger the amounts of the overcharges and consequently, the larger the income tax payments, the greater the equities in favor of their retention by the violator. And, in the same vein, the longer that a violator such as here, could successfully conceal the true facts and withhold necessary information from the Expediter, or "the more grievous the wrong done, the less likelihood there would be of recovery" (*Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. at p. 265).

Thus, the decision below solicits misinformation, non-compliance with the lawful requests of the Expediter and severely impairs the right of restitution to the tenants of rent overcharges as an arm of compliance. The importance of the latter cannot be minimized as the decision of the Supreme Court in *Porter v. Warner Holding Company*, *supra*, fully brought out. After stating that an order for the recovery and restitution of illegal rents may be considered a proper "other order," within the meaning of Section 205 (a) of the 1942 Act, on either of two theories, the first of which is as an equitable adjunct to an injunction decree, the Supreme Court set forth the second theory as follows (at p. 400):

It may be considered as an order appropriate and necessary to enforce compliance with the Act. * * * In framing such remedies under § 205 (a), courts must act primarily to effectuate the policy of the Emergency Price Control Act and to protect the public interests involved. * * * Future compliance may be more definitely assured if one is compelled to restore one's illegal gains; and the statutory policy of preventing inflation is plainly ad-

vanced if prices or rents which have been collected in the past are reduced to their legal maximums.

It is clear that the denial of restitution by the District Court wholly deprives the Expediter of the opportunity to enforce compliance by refusing to compel restoration of the status quo.

The lack of soundness in the exercise by the District Court of its discretion in denying restitution is further demonstrated by testing the Court's action against the established equitable maxim that a wrongdoer may not benefit from his own wrong (see e. g., *Bigelow v. RKO Radio Pictures, Inc.*, *supra*; *R. H. Stearns Co. v. United States*, 291 U. S. 54; *Woods v. Stone*, *supra*). In seeking restitution to the tenant of the full amount of the overcharges, plaintiff "asks the Court to act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant" (*Porter v. Warner Holding Company*, *supra*). Yet despite the defendants' admission of violations, the District Court's judgment permits defendants to retain all of the fruits of their violation. "But the landlord is not allowed thus to profit from his own disobedience of the law" (*Woods v. Stone*, 333 U. S. at p. 475; see: *United States v. Paramount Pictures*, 334 U. S. 131 at p. 171; see also: *Schine Chain Theatres v. United States*, 334 U. S. 110).

C. *Contrary to the holding below, the Housing Expediter is not subject to laches.*

It is well settled that laches is not imputable to the United States in a suit where the Government is en-

forcing or vindicating the public interest (*United States v. Beebe*, 127 U. S. 338, 342; *San Pedro, etc. Co. v. United States*, 146 U. S. 120; *United States v. Van Zandt*, 24 U. S. 184; see *United States v. Summerlin*, 310 U. S. 414, 416; *Ches. & Del. Canal Co. v. United States*, 250 U. S. 113, 125, and cases there cited: *Iowa v. Carr*, 191 Fed. 257 (C. C. A. 8); *Creedon v. Evangelista, supra*; cf. *Lola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173). Since a suit by the Expediter is for all purposes a suit on behalf of the United States,¹³ the doctrine of laches has no place in this case.

CONCLUSION

The judgment should be reversed and the Court below directed to enter judgment as prayed for in the complaint.

Respectfully submitted.

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¹³ *United States v. Koike*, 164 F. 2d 155 (C. C. A. 9); *Fleming v. Findlay*, 165 F. 2d 79 (C. C. A. 9); *Fleming v. Goodwin*, 165 F. 2d 334 (C. C. A. 8).

APPENDIX

1. Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, et seq.) :

SEC. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the

course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

2. Maximum Rent Regulation 53 (Vol. 7, No. 210 Fed. Reg. at p. 8596 (Oct. 24, 1942):

SEC. 1388.281. *Scope of regulation.*—(a) This Maximum Rent Regulation No. 53 applies to

all housing accommodations within each of the following Defense-Rental Areas (each of which is referred to hereinafter in this Maximum Rent Regulation as the "Defense-Rental Area"), as designated in the designations and rent declarations (§§ 1388.1201 to 1388.1205, 1388.1251 to 1388.1255, 1388.1301 to 1388.1305, 1388.1311 to 1388.1315, 1388.1321 to 1388.1325, and 1388.1331 to 1388.1335, inclusive) issued by the Administrator on April 28, 1942, as amended, on May 26, 1942, on June 3, 1942, on June 26, 1942, on July 29, 1942, and on August 13, 1942, except as provided in paragraph (b) of this section.

SEC. 1388.281. (b) This Maximum Rent Regulation does not apply to the following:

(3) Rooms or other housing accommodations within hotels or rooming houses, or housing accommodations which have been, with the consent of the Administrator, brought under the control of the Maximum Rent Regulation for Hotels and Rooming Houses pursuant to the provisions of that regulation: *Provided*, That this Maximum Rent Regulation does apply to entire structures or premises though used as hotels or rooming houses.

SEC. 1388.284. *Maximum rents*.—Maximum rents (unless and until changed by the Administrator as provided in § 1388.285) shall be:

(a) For housing accommodations rented on March 1, 1942, the rent for such accommodations on that date.

SEC. 1388.293. *Definitions*.—(a) When used in this Maximum Rent Regulation No. 53:

(11) The term "hotel" means any establishment generally recognized as such in its community, containing more than 50 rooms and used predominantly for transient occupancy.

(12) The term "rooming house" means, in addition to its customary usage, a building or portion of a building other than a hotel in which a furnished room or rooms not constitut-

ing an apartment are rented on a short time basis of daily, weekly, or monthly occupancy to more than two paying tenants not members of the landlord's immediate family. The term includes boarding houses, dormitories, auto camps, trailers, residence clubs, tourist homes or cabins, and all other establishments of a similar nature.

3. Rent Regulation for Housing (10 F. R. 13528):

SEC. 1. *Scope of this regulation*—(a) *Housing and defense-rental areas to which this regulation applies*.—This regulation applies to all housing accommodations within each of the defense-rental areas and each of the portions of a defense-rental area (each of which is referred to hereinafter in this regulation as the “defense-rental area”), which are listed in Schedule A of this regulation, except as provided in paragraph (b) of this section.

In Schedule A “the maximum rent date” and “the effective date of regulation” is given for each defense-rental area listed. More than one effective date is given for different portions of a defense-rental area where the same effective date is not applicable to the entire defense-rental area. Wherever the words “the maximum rent date” or the words “the effective date of regulation” are referred to in this regulation, the dates given in Schedule A for the particular defense-rental area or portion of the defense-rental area in which the housing accommodations are located shall apply. The effective date listed in Schedule A in each instance is the date rent regulation was effective in the particular defense-rental area or portion of the defense-rental area.

(b) *Housing to which this regulation does not apply*.—This regulation does not apply to the following:

(3) *Rooms in hotels, rooming houses, etc.*—Rooms or other housing accommodations within

hotels or rooming houses, or housing accommodations which have been, with the consent of the Administrator, brought under the control of the Rent Regulation for Hotels and Rooming Houses pursuant to the provisions of that regulation.

SEC. 4. *Maximum rents*.—Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented on maximum rent date*.—For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.

SEC. 13. *Definitions*.—(a) When used in this regulation the term:

(11) “Hotel” means any establishment generally recognized as such in its community containing more than 50 rooms and used predominantly for transient occupancy.

(12) “Rooming house” means, in addition to its customary usage, a building or portion of a building other than a hotel in which a furnished room or rooms not constituting an apartment are rented on a short-time basis of daily, weekly, or monthly occupancy to more than two paying tenants not members of the landlord’s immediate family. The term includes boarding houses, dormitories, auto camps, trailers, residence clubs, tourist homes or cabins, and all other establishments of a similar nature.

4. Controlled Housing Rent Regulation (12 F. R. 4331):

SEC. 825.4. *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947*.—The maximum rent for any housing accommodation under §§ 825.1 to 825.12, inclusive (unless and until changed by the Expediter as provided in § 825.5) shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as

amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section.

5. Revised Procedural Regulation 3 (8 F. R. 526, 9 F. R. 1656):

SEC. 1300.209. *Applications for review.*—(a) Any landlord whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative, may within a period of sixty days after the date of issuance of such determination, regardless of the effective date thereof, file with the rent director an application for review of such determination by the regional administrator for the region in which the defense-rental area office is located: *Provided*, That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered by the rent director under § 1300.207 of this regulation, may either apply for review of such order as provided in this section, or may protest any provision of such order as provided in §§ 1300.215 to 1300.223, inclusive, of this regulation. An application for review shall be filed in triplicate upon forms prescribed by the Administrator and pursuant to instructions stated on such forms. Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings with respect to which such application is filed to the appropriate regional administrator.

SEC. 1300.215. *Right to protest.*—Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 1300.210 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under § 1300.207 of this regula-

tion, may file a protest in the manner set forth below. A landlord is, for the purposes of this regulation, subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him. Any protest filed by a landlord not subject to the provision protested, or otherwise not in accordance with the requirements of this regulation, may be dismissed by the Administrator.

Schedule of overcharges

Unit	Name of tenant	Legal maximum rent	Amount paid	Period of overcharge commencing	Amount of overcharge
		<i>Per month</i>	<i>Per week</i>		
205	Mary E. O'Shea.....	\$32.50	\$10.00	8-15-45, for 31 weeks (to 3-20-46)	\$79.50
*207	H. Herrmann.....	45.00	15.00	10-1-43, for 132 weeks.....	*608.52
208	W. R. Campbell.....	7.00	10.00	4-10-45, for 49 weeks (to 3-18-46)	147.00
*210	Allen D. Bull.....	55.00	25.00	1-7-44, for 16 weeks.....	*196.80
*210	Allen D. Bull.....	55.00	22.50	4-28-44, for 99 weeks.....	*970.20
216	M. Louisa Riley.....	55.00	20.00	10-24-45, for 13 weeks (to 1-24-46)	94.90
217	J. M. Reardon.....	32.50	10.00	8-3-45, for 33 weeks (to 3-23-46)	82.50
*304	M. P. Anderson.....	35.00	10.00	8-24-45, for 30 weeks.....	*55.00
305	Nettie G. Johnson, Adelyn Fredrickson.....	35.00	10.00	12-2-43, for 120 weeks (to 3-22-46)	218.40
312	Andrew P. M. Weir.....	35.00	12.50	10-28-44, for 72 weeks (to 3-15-46)	318.24
315	Maxine Scarlett, Adelyn Frederickson.....	35.00	10.00	10-14-44, for 74 weeks (to 3-15-46)	142.08
405	Catherine Carroll.....	35.00	10.00	3-27-45, for 51 weeks (to 3-19-46)	97.73
*407	Fern Boltz.....	50.00	18.00	8-15-44, for 83 weeks.....	*535.35
411	Nettie Simms, Janice Erickson.....	37.50	12.50	10-16-44, for 74 weeks (to 3-17-46)	284.16
505	Norma G. Sessums.....	32.50	40.00	9-14-44, for 13 months (to 10-14-45)	97.50
505	Mrs. J. Northledge.....	32.50	10.00	10-20-45, for 21 weeks (to 3-17-46)	52.50
507	Georgie F. Corbett.....	50.00	20.00	2-9-46, for 5 weeks (to 3-16-46)	42.25
\$510	Eileen J. Maloy.....	50.00	22.50	2-15-44, for 83 weeks.....	*908.85
*511	H. H. Tubbs.....	35.00	10.00	9-16-44, for 78 weeks.....	*149.76
605	Mariah K. Sutherland, Marie Knapp.....	35.00	10.00	6-30-44, for 80 weeks (to 1-20-46)	153.60
615	J. B. Fordyce.....	37.50	12.50	9-28-44, for 77 weeks (to 3-20-46)	295.68
	Total.....				5,530.72

*No longer in issue in this suit on basis of refund of overcharges by defendants to tenant.

No. 12039

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellant,

vs.

JOHN McCORD and FLORENCE McCORD,

Appellees.

APPELLEES' BRIEF.

DESSER, RAU, CHRISTENSEN & HOFFMAN,
JACK J. LANDE, *of Counsel*,
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Attorneys for Appellees.

MAR 26 1949

PAUL P. O'BRIEN,

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APPELLEES' BRIEF.

Facts.

With as few material facts in issue as are here involved, it is amazing that appellant could draw therefrom the inferences and make the innuendoes which appear throughout his brief. Perhaps it is understandable that appellant's personnel, being constantly so exposed in the nature of their work, should become unduly biased and prejudiced in their attitude toward their opponents. Fortunately, as in the instant case, the court is not swayed by, nor does it have preconceived concepts of persons such as appellees. Little need be added to the Court's own observation [R. 105] that appellees committed no fraud, are not guilty of concealment, and that they conducted themselves in a manner which they believed to be proper [R. 104], and further that appellees acted reasonably and

in good faith in seeking advice in the matter of registering their property [R. 104]. It is only because of the slant given to the very few material facts that appellees are called upon to controvert and take issue with the statement of facts as appears in appellant's brief.

The McCords as lessees acquired the master lease on the Belmont Apartment Hotel on July 1, 1941, and immediately began to operate it as a hotel [R. 132]. The name included "hotel" and hotel services were rendered [R. 76] long before rent control became a fact. There was no change in the conduct of the establishment in the nature of services from the time of acquisition until the sale of the lease on April 1, 1946 [R. 84]. The McCords did not personally operate the establishment. They had a manager who was in active charge of the hotel [R. 65]. On or about September 1, 1943, the McCords moved to Hemet, California [R. 83, 85], and remained in Hemet until they moved to Ontario, California on or about March 1, 1945 [R. 83].

These facts were known to appellant on July 7, 1944 when the McCords filed two supplemental registrations [R. 115, 116] with OPA, indicating the McCord address in Hemet, California. The change of mailing address to Hemet was recognized by the OPA by its letter of October 20, 1944 [R. 131, 133]. Notwithstanding that fact, the OPA addressed and mailed its subsequent letters to the McCords in Los Angeles [R. 119, 125, 126, 127, 128, 129, 130]. It is not contested that the letters were mailed, but it has been denied and refuted that some of the letters were received and that others were not received promptly, as it appears that during this period of time, and for some three years prior to the hearing in Court in

February, 1948, Mr. McCord had been ill and was ill on the day of the trial. He had been in and out of the hospital some five times [R. 82]; that sometimes the mail was forwarded [R. 83], and sometimes Mr. McCord or Mrs. McCord would be in Los Angeles and pick up the mail [R. 86, 88, 89]. This accounts for much of the delay that may have been entailed since the initial letter of July 12, 1944 [R. 132].

Appellant has made considerable issue in his brief concerning the dilatory tactics of the McCords, but this obviously did not impress the Court since the Court found there was no fraud or concealment and viewed the continuous negotiations as an ordinary matter of business [R. 105]. An examination of the letters will indicate that much took place between the several letters [Plaintiff's Exhibit 3], which appellant, in footnote 6 on page 4 of his brief, describes as unsuccessful attempts to elicit information, in that the fact is that after McCord's letter of July 12, 1944 [R. 132], the initial request by the OPA is dated October 20, 1944 [R. 131], and from reading the next letter from OPA dated December 6, 1944, it is apparent that there had been a response to the October 20, 1944 letter, and that certain specific information was requested in the nature of a chart, which information particularly referred to occupancy during the months of June, September and October of 1942, and November of 1944. The next letter from OPA of January 2, 1945 [R. 129], indicates that a chart, as requested, for June, September and October, 1942, and November, 1944, had been furnished, but that now the request was for a chart for January of 1945 [R. 128, 129]. The OPA, on May 10, 1945 [R. 126], had received the chart requested, but by

now had asked for additional information covering the month of April, 1945. And McCord's letter of June 5, 1945 [R. 144] indicates by its nature that the letters of May 26, 1945 [R. 125] had just been received.

It was this careful examination by the Court of Plaintiff's Exhibit 3, consisting of the series of letters, which undoubtedly prompted the Court to refer to the negotiations as an "ordinary matter" [R. 105]. It is obvious from an examination of Plaintiff's Exhibit 3—the series of letters—that in response to each of the letters a chart was submitted as requested, but that in each successive letter information for a different month was requested by the OPA. That this is not unusual, the Court could almost take judicial notice, in view of the problems that landlords had with OPA and OPA had with landlords not understanding each other about what information was wanted and furnished. Nowhere in the series of letters [Plaintiff's Exhibit 3] is there any indication that the OPA considered the registration improper but, as stated by counsel, OPA apparently accepted the initial letter as a petition of some nature.

The uncertainty of the nature of the establishment is best demonstrated by the reference of appellant's counsel to it as a "hotel" [R. 75]. The fact that subsequently the McCords chose to register on another OPA form is not an admission that its original registration was wrong, but is a common and quite understandable reaction in following the line of least resistance. Even this registration

had to be filed twice before it was acceptable to the OPA [R. 84], all of which caused further passage of time.

While the matter of proceeding for an injunction does not appear in the evidence and should not therefore properly be before this Court, appellant has taken the liberty of calling it to the Court's attention, based on the opening statement of his counsel [R. 31], and has concluded therefore, as a result of the suit, that the McCords re-register (App. Br. p. 5). As long as counsel has taken this liberty, may we invite the Court's attention to the explanation given by Mrs. McCord of why such suit was necessary, that the McCords acted under the advice of counsel that the inspection of all other books and records be made in pursuance to some judicial authority [R. 40]. (See also Appellant's Memorandum for Trial, Paragraph III), and upon said filing the McCords did forthwith comply.

The Court was aware of these proceedings and apparently did not consider the conduct heinous on the part of the McCords [R. 104, 105]. The Court did observe that while the Government had a right to assume that the registrations were honest, it also pointed out that the McCords knew not one form from the other, and necessarily had to rely on the advice of appellant's office and personnel and found that such conduct was not objectionable [R. 104]. It further appears that in the original registration the McCords did not ask for any specific form but made very clear the nature of their establishment and how it was conducted, and that the OPA personnel actu-

ally suggested and selected the form upon which the McCords were to register [R. 79, 80]. While it is true that the courts have held that the Government could not be estopped by reason of the oral advice of its employees, it is nevertheless a pertinent fact for the consideration of the Court, in determining whether or not the Court should exercise its chancery powers as herein requested. If there had been any question of improper conduct on the part of the McCords, the injunction suit filed in December, 1945 [R. 31], not only would have contained the demand for registration, but also charges of overcharge, if any. Since the action was dismissed with prejudice (Appellant's Memorandum for Trial, Paragraph III, p. 5, line 22), it should be self-evident that the Rent Director concluded no wrong had been committed by the McCords. This alone should preclude the present action.

In December, 1945, the McCords could have protected themselves by obtaining a refund of income taxes paid on the income from 1942 to 1945. This was no longer available to them, because of the statute of limitations, when the OPA chose to file its action on March 22, 1947, and the time that necessarily elapsed before trial and the determination thereof in February, 1948. It is extremely difficult to follow appellant's theory of referring to the McCords "procrastination" and that the McCords "prevented the early institution of suit" (App. Br. pp. 20 and 21). The Court was not so persuaded [R. 104, 105]. The opportunity of the McCords to adjust their costs or be relieved of hardship by rent revision of course long were passed and particularly on April 1, 1946.

ARGUMENT.

The Sole Issue Before This Court Is the Question of Whether the Trial Court Abused Its Discretion in Not Ordering Restitution of Alleged Overcharges.

(a) That the Court ordinarily has the power of restitution under Section 205a of the Act and as set forth in *Porter v. Warner Holding Co.*, 328 U. S. 395, is not *per se* debatable and was not an issue before the Court. The Court acknowledged that, and stated that it had such powers [R. 95]. The Court further set forth that in the instant matter, since the McCords were no longer owners of the property, no injunction was necessary or proper, nor would any be granted [R. 95].

(b) It had been held in *Porter v. Black and Sherwood Distilling Co.*, 156 F. 2d 264, that since injunctions deal primarily with future threatened violations and not past violations that an injunction should not be employed to punish past violations or to establish that violations have occurred. Following this decision, an application for a rehearing was made by the Administrator, based on *Porter v. Warner Holding Co.*, *supra*, on the theory that the court had such power under the language of *Porter v. Warner Holding Co.* The Circuit Court, upon rehearing, pointed out that the cases were distinguishable, in that in the *Black* case the court had no power to issue the injunction since the facts were all in the past and none were being threatened, and therefore there was no basis for the injunction, and consequently there could be no incidental relief of restitution. However, this principle involving the right of restitution was not an issue in the case because the matter turned on the propriety of the exercise of the court's traditional chancery powers.

(c) A further point was made by appellant that the United States is not bound by the statute of limitations or by laches. There is no question but that in the Act, Section 205e, Congress specifically limited the right of recovery for the tenants, and this statute of limitations for treble damages is binding on the United States, as well as other individuals. That part of the Court's finding which specifically found [R. 44] that the statute of limitations barred the action under 925e, refers to that portion of appellant's pleadings [R. 234], in which appellant sets forth its action was under 205e and asked for relief in the nature of treble damages thereunder. That the Court also was cognizant of and understood the general rule that the doctrine of laches could not be exerted against the United States, is noted by the Court's statement that "I am aware that the Government is not barred by any statute of limitations" [R. 102]. The Court, in referring to "laches" did refer to the tenants in the matter of being derelict [R. 105]. While it may be accepted as a general rule that the statute of limitations and the doctrine of laches cannot be exerted against the United States in its sovereign capacity, that the rule is subject to the exceptions, which the Congress and the Court itself has indicated brings the United States, by statute or otherwise, within the doctrine specifically. For example, in *Utah Power & Light v. United States*, 243 U. S. 389, at 409, the Court repeated the general rule that laches and the statute of limitations are not a defense against the Government, but that this might be subject to exceptions. There have been several decisions, particularly involving rent cases, in which our Courts have referred to laches as a valid doctrine. The point is not really in issue but for the sake of clarifying the principles involved and

the theory of the Court, it is to be noted that there is respectable authority for the proposition that laches may be considered in these types of cases. (*Blood v. Fleming*, 161 F. 2d 292, at 296; *Woods v. Winters*, 171 F. 2d 759; *Porter v. Warner Holding Co.*, 328 U. S. 395 at 396; *Creedon v. Randolph*, 165 F. 2d 918 at 919; *Wall v. Brim*, 145 F. 2d 492.)

In *Woods v. Winters*, 171 F. 2d 759, which was decided December 31, 1948, the Court pointed out that the exercise of the chancery powers was in its sound discretion, and particularly said that

“the doctrine of laches applies to an application for an injunction or other order to force compliance with Section 4 of said Act, as amended (50 U. S. C. A. Appendix 904).”

Appellant has quoted the case of *Wood v. Stone*, 333 U. S. 472, as authority to the contrary, and the Court's attention is respectfully invited to the fact that in that case neither laches nor Section 205a was involved.

Be that as it may, while the doctrine of laches itself is not an issue upon which the instant case turned, it was part of the evidence before the Court, which the Court was justified in considering in the exercise of its discretion as to whether the Court should grant equitable relief within its chancery powers.

(d) The sole question before the trial court, and which this Court must decide, is whether the trial court abused its discretion by refusing to grant equitable relief in the instant case. It is obvious that the Court realized that this was the only issue before it, as it twice called counsel's attention to the singular issue before it [R. 95, 103].

It is true, in the case of *Creedon v. Randolph*, 165 F. 2d 918, the Circuit Court of Appeals remanded that case to the District Court, with instructions to exercise its discretion. In that case the Court pointed out that the landlord apparently did not testify nor did the appellee landlord participate in the appeal or even appear; that it was tried primarily by the Court as a default matter and under those circumstances the District Court's action in refusing to exercise its discretion might have been an abuse, and therefore reversed and remanded the case, with instructions to exercise the discretion that belonged to it. This ruling did not direct the District Court to find against the defendant, but simply that it should act and it was an abuse not to exercise its discretion. It is submitted here that the District Court did exercise its discretion and determined that the instant case was not one in which the chancery powers should be granted.

It is inescapable from reading the Court's opinion which is found in R. 95, 96 and 102-106; that the Court considered all of the factors before it, the conduct and the attitude of the McCords, the good faith in which they proceeded [R. 104] and the fact that there was no fraud or concealment of their operations [R. 105]; that they ran this establishment as a hotel under the belief that it was such [R. 104]; that it was they who initiated and raised the dubious question rather than any complaint to or proceeding by appellant [R. 105]; that by virtue of the change of conditions and the position of the McCords they were irreparably injured and that it would be inequitable to order any reimbursement [R. 105, 106]. These factors all added up to cause the Court to decide not to exercise its chancery powers. It was simply a case

which did not appeal to the conscience of the Chancellor. There was no abuse of discretion therein, and there is sufficient evidence to substantiate these findings and the exercised discretion of the Court. It is interesting to note that even in those cases which are cited by appellant for its authority, throughout them runs the vein that the Court must decide each case according to the necessities of that case. As is said in *Hecht v. Bowles*, 321 U. S. 321, and *Porter v. Warner Holding Co.*, 328 U. S. 395, 398, "power of the chancellor to do equity and to mold each decree to the necessities of the particular case." The Court had before it the McCords, all of the documents, the exhibits, the registrations; it had the opportunity to observe the demeanor of the McCords, the interests involved, and from all that was before it, including the pleadings, the Court justifiably decided that there was no fraud, no concealment, and a case of fair and proper conduct on the part of the McCords. Therefore the Court's findings of fact therein should not be disturbed. From these facts the Court's decision is sound and justified. It is true that there might have been a mistake, but it has never been decided yet whether the Belmont Apartment Hotel is or is not a hotel within the meaning of the Act, and the mere acquiescence on the part of the McCords in following the line of least resistance in reregistering does not change the situation or indicate any reason for ordering restitution. It is true that the McCords did compromise and otherwise dispose of several claims [R. 66], but this, too, was in the nature of following the line of least resistance and following a course of conduct which is economically sound. It is not, as stated by appellant (Br. pp. 6 and 7) that the claims were fully admitted therein.

The Court's attention is respectfully invited to *Columbia Gas v. United States*, 151 F. 2d 461, in which the defenses were raised that equity relief should not be granted because the appellants had not come into Court with clean hands, and that the applicants themselves were guilty of violating many of the equitable principles which must exist before relief could be granted to them. The Court in that case pointed out that equity would not police enforcement of laws, nor apply to every unconscionable act, nor was it an avenger of those wronged; that while the general doctrines of the basis for the right of equitable relief must prevail, notwithstanding a digression from those principles, equity itself would not, as it stated "be an avenger." So, in the instant case, if the McCords have by any act been wrong, notwithstanding that, equity should still proceed to exercise its powers in such manner as is just and proper in the premises.

Conclusion.

The judgment should be sustained. This Circuit Court of Appeals should find that the District Court acted properly and did not abuse its discretion in refusing to exercise its chancery powers in denying relief to appellant under the pleadings in the case and the evidence produced at the trial.

Respectfully submitted,

DESSER, RAU, CHRISTENSEN & HOFFMAN,

By JACK J. LANDE,

Attorneys for Appellees.

No. 12042

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ERNEST J. UARTE,

Appellee.

TRANSCRIPT OF RECORD

Appeal From the District Court of the United States
for the Southern District of California,
Northern Division

FILED

NOV 29 1948

PAUL P. O'BRIEN,
CLERK

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In the District Court of the United States for the
Southern District of California
Northern Division
Civil No. 648-ND

ERNEST J. UARTE,

Plaintiff,

vs.

UNITED STATES OF AMERICA; DEPARTMENT
OF THE NAVY; TWELFTH NAVAL DIS-
TRICT; GOLDEN STATE COMPANY, LTD.;
DON ARTHUR McCOY; FIRST DOE; SEC-
OND DOE; THIRD DOE; FOURTH DOE and
FIFTH DOE,

Defendants.

COMPLAINT FOR PERSONAL INJURIES
ARISING OUT OF TORT

Plaintiff complains of defendants and states his claim
as follows:

I.

That the true names of the defendants sued herein un-
der the fictitious names of First Doe, Second Doe, Third
Doe, Fourth Doe, and Fifth Doe are unknown to plaintiff.

II.

That the defendants Department of the Navy and
Twelfth Naval District are departments and divisions of
the United States.

III.

That defendant Golden State Company, Ltd., is and
was at all times herein mentioned a corporation duly or-

ganized and existing under the laws of the State of Delaware. [2]

IV.

That at all times herein mentioned, defendants United States of America, Department of the Navy, and Twelfth Naval District were the owners of a Ford Station Wagon; that Richard Francis Rogers and Roger Davis Green were employees of defendants United States of America, Department of the Navy, and Twelfth Naval District; and that Richard Francis Rogers and Roger Davis Green were driving, operating and using said Ford Station Wagon with the knowledge, permission and consent of said owners, and within the scope of said employment.

V.

That at all times herein mentioned, Golden State Company, Ltd., a corporation, was the owner of a tractor and semi-trailer; that defendant Don Arthur McCoy was an employee of defendant Golden State Company, Ltd.; and that defendant Don Arthur McCoy was driving, operating and using said tractor and semi-trailer with the knowledge, permission and consent of said owner, and within the scope of said employment.

VI.

That on or about July 24, 1946, on U. S. Highway No. 99, approximately two miles north of the City of Madera, County of Madera, State of California, said Richard Francis Rogers and said Roger Davis Green negligently drove, operated and used said Ford station wagon, and defendant Don Arthur McCoy negligently drove, operated

and used said tractor and semi-trailer, and thereby caused said Ford Station Wagon to collide with a Ford sedan automobile owned and driven by plaintiff, and caused said Ford sedan automobile to come into collision with said tractor and semi-trailer, injuring and damaging plaintiff and his said Ford sedan automobile as is hereinafter described.

VII.

That as a proximate result thereof, plaintiff received severe [3] personal injuries, including a fracture of the skull, a fracture of the right leg, multiple fractured ribs, a punctured and collapsed lung, and other injuries of the head and body; that said injuries caused plaintiff severe pain and suffering; that the full nature and extent of all of said injuries are unknown to plaintiff at this time, but plaintiff is informed and believes, and upon such information and belief alleges that said injuries are permanent and will cause plaintiff to be permanently injured and crippled and will cause plaintiff pain, suffering and disability for the rest of his life; all of which is to plaintiff's damage in the sum of \$50,000.00.

VIII.

As a proximate result thereof, plaintiff has incurred medical, hospital and nursing expenses in the sum of \$2,271.25, to plaintiff's damage in said sum of \$2,271.25; that plaintiff will incur additional medical, hospital and nursing expenses in the future, the amount of which is now unknown to plaintiff, and when plaintiff ascertains the amount of such expenses, he will ask leave of this

Court to amend this complaint and insert herein the amount thereof.

IX.

That at the time of said accident plaintiff was employed by Bank of America, National Trust & Savings Association, and as a proximate result of said accident plaintiff was unable to perform any services in the said employment from the date of said accident to February 15, 1947, to plaintiff's further damage in the sum of \$1,765.00.

X.

That as a proximate result thereof, plaintiff's Ford sedan automobile was broken and damaged in the sum of \$600.00, to plaintiff's further damage in said sum of \$600.00. [4]

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$54,636.25 and for costs of suit herein.

STAMMER & McKNIGHT

W. H. STAMMER

GALEN McKNIGHT

By Galen McKnight

Attorneys for Plaintiff

[Endorsed]: Filed Jul. 17, 1947. Edmund L. Smith, Clerk. [5]

In the District Court of the United States in and for the
Southern District of California
Northern Division

No. 648—ND

ERNEST J. UARTE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ANSWER AND COUNTERCLAIM

Comes now the defendant, United States of America, and for its answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraphs I, II and III of said complaint, this answering defendant alleges that the Court has heretofore ordered that the action proceed solely against the United States of America; that by reason thereof all of the allegations contained in said paragraphs are immaterial to the issues of said case.

II.

Answering paragraph IV of said complaint, this answering defendant admits that at all times mentioned in said complaint it was the owner of a 1942 Ford Station Wagon, USN-23752; and further admits that at all of said times Richard Francis Rogers and Roger Davis Green were employees of this answering defendant, to wit, members of the United States Navy; further answering said paragraph, this answering defendant alleges that it is without knowledge or information sufficient to form a belief with respect to which of [6] said employees was driving, operating and using said Ford Station Wagon

at the times and places involved herein, and in that connection alleges that whichever of said employees of this defendant was driving, operating and using said Ford Station Wagon at the times and places involved herein was doing so with the knowledge, permission and consent of this defendant and while acting within the scope of his office or employment and in line of duty; that the hereinafter mentioned collision resulted in the deaths of the said Richard Francis Rogers and Roger Davis Green, the death of said Richard Francis Rogers occurring instantly and the death of said Roger Davis Green occurring at approximately 6:50 A. M. on July 25, 1946; further answering said paragraph, this answering defendant denies generally and specifically each and every allegation contained therein and not herein specifically admitted.

III.

Answering paragraph V of said complaint, this answering defendant admits that at all times herein mentioned Golden State Company, Ltd., a corporation, was the owner of a tractor and semi-trailer; that Don Arthur McCoy was an employee of Golden State Company, Ltd.; and that said Don Arthur McCoy was driving, operating and using said tractor and semi-trailer with the knowledge, permission and consent of said owner, and within the scope of said employment.

IV.

Answering paragraph VI of said complaint, this answering defendant admits that on or about July 24, 1946, at approximately 11:30 P. M., on U. S. Highway No. 99, approximately two miles north of the City of Madera, County of Madera, State of California, either the said Richard Francis Rogers or the said Roger Davis Green was driving and operating the aforementioned Ford Station Wagon in a southerly direction; and that at the

aforesaid time and place the aforementioned Don Arthur McCoy was driving and operating the aforementioned tractor and semi-trailer in a northerly direction; further answering said paragraph, this answering defendant admits that at the aforesaid time and place the plaintiff was driving and operating a certain Ford sedan automobile in a southerly direction; further answering said paragraph, this answering defendant denies generally and specifically each and every allegation contained [7] therein and not herein specifically admitted, and in that connection this answering defendant alleges that at all of the aforesaid times and places the plaintiff did so negligently, carelessly and recklessly drive and operate his aforesaid Ford sedan so as to cause it to, and it did, cross over into the east lane of traffic and collide with the right front of the aforementioned tractor and semi-trailer, causing said tractor and semi-trailer to cross into the west lane of traffic, which was occupied by the aforementioned Ford Station Wagon, and causing a collision to occur between said Ford Station Wagon and the said tractor and semi-trailer.

V.

Answering paragraph VII of said complaint, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph with respect to the nature or extent of the injuries and damages sustained by the plaintiff and, therefore, denies the same and every part thereof; further answering said paragraph, this answering defendant generally and specifically denies that any of the therein mentioned injuries or damages whatsoever, either in the sum or of the nature or to the extent therein alleged, or in any other sum or sums, or at all, were sustained by the plaintiff, or that the plaintiff

was in any manner or respect whatsoever injured or damaged, or that plaintiff was caused to be permanently or otherwise injured or crippled, or was caused any pain, suffering or disability whatsoever, by reason or because or as a direct or proximate result of any negligent or wrongful act or omission of this answering defendant or of any employee of it; and denies that the plaintiff has been, was or is damaged in the sum of Fifty Thousand Dollars (\$50,000.00), or in any other sum or sums, or at all.

VI.

Answering paragraph VIII of said complaint, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph; further answering said paragraph, this answering defendant generally and specifically denies that the plaintiff has incurred medical, hospital or nursing expenses, [8] either of the value in said paragraph alleged, or of any other value, or at all, or that the plaintiff has been damaged, either in the sum therein alleged, or in any other sum or sums, or at all, or that the plaintiff will incur additional medical, hospital or nursing expenses in the future in any amount whatsoever, or at all, by reason or because or as a direct or proximate result of any negligent or wrongful act or omission of this answering defendant or of any employee of it; and denies that the plaintiff has been, was or is damaged in the sum of Two Thousand Two Hundred Seventy-One and 25/100 Dollars (\$2,271.25), or in any other sum or sums, or at all.

VII.

Answering paragraph IX of said complaint, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth

of the allegations contained in said paragraph with respect to the employment or earnings of the plaintiff and as to his inability to perform any services in his said employment, and, therefore, denies the same and every part thereof; further answering said paragraph, this answering defendant denies that the plaintiff was unable to perform any services in his employment therein referred to, either for the period therein named, or for any other period, or at all, or that the plaintiff was, is or has been damaged in the sum of One Thousand Seven Hundred Sixty-Five Dollars (\$1,765.00), or in any other sum or sums, or at all, by reason or because or as a direct or proximate result of any negligent or wrongful act or omission whatsoever of this answering defendant or of any employee of it.

VIII.

Answering paragraph X of said complaint, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained; further answering said paragraph, this answering defendant generally and specifically denies that the plaintiff's Ford sedan automobile was broken or damaged in the sum of Six Hundred Dollars (\$600.00), or in any other sum or sums, or at all, or that the plaintiff has been damaged in said sum of Six Hundred Dollars (\$600.00), or in any other sum or sums, or at all, by reason or because or as a direct or [9] proximate result of any negligent or wrongful act or omission whatsoever of this answering defendant or of any employee of it.

IX.

Further answering said complaint, this answering defendant denies that by reason or because or as a direct or proximate result of any negligent or wrongful act or

omission of it or of any of its employees, either as alleged in the complaint, or of any other kind or nature whatsoever, the accident mentioned in said complaint occurred, or that thereby, or at all, the plaintiff was injured or sustained any damage to or loss of property, or any personal injury, in any particular or manner or sum whatsoever.

X.

Further answering said complaint, this answering defendant denies that at the time or place mentioned in the complaint, or at any other time or place, it or any of its employees, including the aforementioned Richard Francis Rogers and Roger Davis Green, committed any negligent or wrongful act or omission in any particular or manner whatsoever.

And for a Second, Separate and Further Answer and Affirmative Defense to the Plaintiff's Complaint on File Herein, This Answering Defendant Alleges:

I.

That neither the accident referred to or mentioned in the plaintiff's complaint, nor any of the injuries or damages, if any, alleged to have been sustained by the plaintiff, by reason thereof, occurred or were caused or were sustained by the plaintiff by reason or because or as a direct or proximate result of any negligent or wrongful act or omission whatsoever on the part of this answering defendant or of any employee of it while acting within the scope of his office or employment.

And for a Third, Separate and Further Answer and Affirmative Defense to the Plaintiff's Complaint on File Herein, This Answering Defendant Alleges:

I.

That the accident referred to and mentioned in plaintiff's complaint and all of the injuries and damages, if

any, alleged to have been sustained by the plaintiff, by reason thereof, were solely, directly, proximately and [10] exclusively caused and sustained by the fault, negligence, carelessness, recklessness and unlawful acts of the plaintiff in the premises, in that at all of the times and places mentioned in said complaint the plaintiff negligently and carelessly failed and neglected to exercise or use due, ordinary, reasonable, or any care, caution or prudence to avoid or prevent the aforesaid accident and the resulting injuries and damages, if any, by him sustained, or for his own safety or protection, and at the times and places mentioned in said complaint the plaintiff negligently and carelessly crossed the highway contrary to and in defiance of the laws of the State of California; and said plaintiff did at all of the times and places mentioned in the complaint operate the aforesaid Ford sedan in such a careless, reckless, negligent and unlawful manner as to cause it to, and it did, cross over into the east lane of traffic and collide with the right front of the aforementioned tractor and semi-trailer, causing said tractor and semi-trailer to cross into the west lane of traffic, which was occupied by the aforementioned Ford Station Wagon, and causing a collision to occur between said Ford Station Wagon and the said tractor and semi-trailer; that the plaintiff's aforesaid carelessness, recklessness, negligence and unlawful acts so caused said accident and his said injuries and damages, if any there were, that this answering defendant is in no manner liable or to blame therefor.

COUNTERCLAIM

By way of counterclaim, the defendant, United States of America, alleges:

I.

That this answering defendant is informed and believes and therefore alleges the fact to be that at all times herein

mentioned the plaintiff was the owner and operator of a certain Ford sedan automobile.

II.

That at all times herein mentioned the United States of America was the owner of a certain 1942 Ford Station Wagon, USN-23752; that at the time and place of the happening of the accident hereinafter alleged, the [11] said Ford Station Wagon was assigned to the United States Navy and was being driven and operated by either Richard Francis Rogers or Roger Davis Green, members of the United States Navy, while the driver thereof was acting within the scope of his office or employment and in line of duty.

III.

That on or about July 24, 1946, at approximately 11:30 P. M., on U. S. Highway No. 99, approximately two miles north of the City of Madera, County of Madera, State of California, either the said Richard Francis Rogers or the said Roger Davis Green was driving and operating the aforementioned Ford Station Wagon in a southerly direction; that one Don Arthur McCoy was driving and operating a certain tractor and semi-trailer in a northerly direction; that at the aforesaid time and place the plaintiff was driving and operating the aforesaid Ford sedan automobile in a southerly direction; that at the aforesaid time and place the plaintiff did so negligently, carelessly and recklessly drive and operate his aforesaid Ford sedan so as to cause it to, and it did, cross over into the east lane of traffic and collide with the right front of the aforementioned tractor and semi-trailer, causing said tractor and semi-trailer to cross into the west lane of traffic, which was occupied by the aforementioned Ford Station Wagon, and causing a collision to occur between said Ford Station Wagon and the said tractor and semi-trailer.

IV.

That the aforesaid carelessness, recklessness, negligence and unlawful acts of the plaintiff was the proximate cause of the aforementioned collision and resulting damage to the Ford Station Wagon of the United States of America.

V.

That as a direct and proximate result thereof, the said Ford Station Wagon was broken, damaged and demolished in the approximate sum of Seven Hundred Dollars (\$700.00) to the defendant's damage in said sum of Seven Hundred Dollars (\$700.00). [12]

Wherefore, this answering defendant prays for judgment against the plaintiff as follows: That plaintiff take nothing against it by reason of his complaint and suit on file herein; that this answering defendant have judgment against the plaintiff for Seven Hundred Dollars (\$700.00); that this answering defendant have and be awarded its costs of suit incurred herein; and for such other and further relief as to this Court may seem meet, just and proper in the premises.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING and

ROBERT KOMINS

Assistant U. S. Attorneys

By Robert Komins

Attorneys for Defendant [13]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 11, 1948. Edmund L. Smith, Clerk. [14]

[Title of District Court and Cause]

ANSWER OF PLAINTIFF TO COUNTERCLAIM

As his first defense to the counterclaim of the defendant, United States of America, plaintiff admits, denies and alleges as follows:

I.

Admits the allegations in paragraph I of said counterclaim.

II.

Admits the allegations in paragraph II of said counterclaim.

III.

Admits that on or about July 24, 1946, at approximately 11:30 P. M., on U. S. Highway No. 99, approximately two miles north of the City of Madera, County of Madera, State of California, either the said Richard Francis Rogers or the said Roger Davis Green was driving and operating the aforementioned Ford Station Wagon in a southerly direction; admits that one Don Arthur McCoy was driving and operating a certain tractor and semi-trailer in [15] a northerly direction; admits that at the aforesaid time and place the plaintiff was driving and operating the aforesaid Ford sedan automobile in a southerly direction; admits that said Ford sedan did cross over into the east lane of traffic and that a collision occurred between it and said tractor and semi-trailer and that said tractor and semi-trailer did collide with said Ford Station Wagon; denies that plaintiff was negligent or careless or reckless in any manner whatsoever, or at all, or that any negligence or carelessness or

recklessness or conduct on the part of plaintiff was a proximate cause of any collision or of any damages suffered therein; and denies each, every and all of the remaining allegations contained in paragraph III of said counterclaim.

IV.

Denies each, every and all of the allegations contained in paragraph IV of said counterclaim.

V.

Plaintiff alleges that he is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph V of said counterclaim, and therefore denies that defendant was damaged in the sum of Seven Hundred Dollars (\$700.00), or any sum whatsoever, or at all; and denies each, every and all of the remaining allegations contained in said paragraph V.

As a second defense to said counterclaim, plaintiff alleges:

I.

That at the time and place referred to in said counterclaim, said Richard Francis Rogers and said Roger Davis Green negligently drove, operated and used said Ford Station Wagon, and thereby caused the collision with said Ford sedan automobile and said [16] tractor and semi-trailer; and that said negligence on the part of Richard Francis Rogers and Roger Davis Green proximately contributed to and was the sole cause of said collision and of all injuries and damages suffered therein.

Wherefore, plaintiff prays that defendant take nothing by its counterclaim and that plaintiff have judgment as prayed for in his complaint.

STAMMER & McKNIGHT

W. H. STAMMER

GALEN McKNIGHT

By Galen McKnight

Attorneys for Plaintiff [17]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 31, 1948. Edmund L. Smith, Clerk. [18]

[Title of District Court and Cause]

DEFENDANT'S OBJECTION TO PLAINTIFF'S
FINDINGS OF FACT AND CONCLUSIONS OF
LAW

FINDINGS OF FACT

Defendant objects to Paragraph I of the plaintiff's findings of fact on the ground that they are contrary to the oral findings of the court as enunciated at the time of the argument of the above entitled case.

The court indicated that the position of the vehicles and the position of the bodies after the accident were such as to cause him to believe that the Government vehicle struck the truck owned by the Golden State Company first thereby causing the accident. The court did not indicate that it had a different or alternate theory as to what transpired at the time of the accident.

The theory of the accident as enunciated by the plaintiff in his complaint and as set forth in Paragraph I of his findings of fact, is not in accord with the evidence in that there was no testimony of any contact between the vehicles, and Don Arthur McCoy's testimony as to the bunch of headlights and the fact that one of the vehicles was "clipped or swerved or had a flat tire" was repudiated on cross-examination when he stated that that was merely a conclusion of a guess which he had made without any foundation therefor and [19] that he had seen no contact between the vehicles and had not seen one vehicle attempt to pass the other or at any time see the vehicles come abreast of each other.

It is respectfully suggested that the findings of fact, particularly Paragraph I thereof, be amended in accordance with the court's theory of this accident as stated in open court.

Dated: June 3, 1948.

JAMES M. CARTER
United States Attorney

CLYDE C. DOWNING
Assistant U. S. Attorney

MAX F. DEUTZ
Assistant U. S. Attorney

Attorneys for Defendant

The following added by Court: [H]

The colloquy with counsel on argument at the conclusion of the trial and the court's observation at that time were not intended to be a resume of the evidence or the postulation of any "theory". The Court's remarks were intended to be no more than its conclusion that, from all

of the evidence in the whole case and considering the witnesses, their interests, their manner of testifying and under all the other rules for weighing evidence, the evidence preponderated to show that the driver of the station wagon was negligent, and that such negligence was the proximate cause of the accident, without any contributory negligence on the part of the plaintiff or the driver of the truck vehicle which was involved in the accident.

The objections to the proposed findings are overruled.
Los Angeles, California, June 4, 1948.

PEIRSON M. HALL

Judge, U. S. District Court

[Endorsed]: Filed Jun. 4, 1948. Edmund L. Smith,
Clerk. [20]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on to be heard on the 25th day of May, 1948, before the Court sitting without a jury; and the plaintiff having appeared personally and by and through his attorneys, Stammer & McKnight by Galen McKnight, Esq.; and the defendant, United States of America, having appeared by and through James M. Carter, United States Attorney, Clyde C. Downing, Robert Komins and Max F. Deutz, Assistant United States Attorneys, by Max F. Deutz, Esq.; and the stipulations of the parties and the evidence and proof of the parties having been heard and considered by the Court; and the cause having been submitted to the Court for its decision;

FINDINGS OF FACT

The Court now finds the facts in this case to be as follows: [21]

I.

That on July 24th, 1946, at approximately 11:30 o'clock P. M. on U. S. Highway No. 99, approximately 2.6 miles north of the City of Madera, in the County of Madera, State of California, defendant, United States of America, by and through its employees and agents, Richard Francis Rogers and Roger Davis Green, negligently drove, operated and used a Ford Station Wagon owned by defendant, United States of America, and thereby caused said Ford Station Wagon to collide with a Ford Sedan automobile owned and driven by plaintiff, Ernest J. Uarte, and caused said Ford Sedan automobile to come into collision with a truck owned by Golden State Company, Ltd., a corporation, and driven by Don Arthur McCoy, injuring plaintiff and damaging his said Ford Sedan automobile as hereinafter described.

II.

That at said time and place, said Richard Francis Rogers and Roger Davis Green were Chief Petty Officers in the United States Navy, and, as such, were employees of the defendant, United States of America, and were acting within the scope and course of their office and employment; that both of said men were of equal rating in the United States Navy; that defendant had assigned both of said men to the mission they were performing at the time of said collision, and had given both of them the mutual care, custody and control of said Ford Station

Wagon and the permission to drive it; that both of said men had mutual rights to drive, operate and use said station wagon; and that at the time of said collision, one or the other of said men was driving and operating said station wagon, and both of said men were using said station wagon within the scope and course of their said office and employment.

III.

That the plaintiff, Ernest J. Uarte, was not guilty of any [22] negligence or carelessness or recklessness or fault, or any unlawful act, or failure or neglect to exercise or use due or ordinary or reasonable care or caution or prudence, which proximately contributed to said collision or to the injuries and damages suffered by him therein.

IV.

That plaintiff, Ernest J. Uarte, was the owner of said Ford Sedan automobile, and that as a proximate result of said collision, said Ford Sedan automobile was damaged in the sum of \$593.80, to plaintiff's damage in said sum.

V.

That as a proximate result thereof, plaintiff, Ernest J. Uarte, received severe personal injuries to his further damage in the sum of \$16,536.25.

VI.

That this action was filed and prosecuted to judgment by Stammer & McKnight, attorneys at law, for and on behalf of said plaintiff, Ernest J. Uarte, and that twenty per centum of the amount to be recovered thereunder is a reasonable attorneys' fee to be allowed to said attorneys.

CONCLUSIONS OF LAW

Wherefore, as conclusions of law from the foregoing facts, the Court finds:

I.

That plaintiff, Ernest J. Uarte, is entitled to a judgment against the defendant, United States of America, in the sum of \$17,130.05, and for his costs of suit herein. [23]

II.

That the defendant, United States of America, is not entitled to recover upon its counterclaim or to any judgment against the plaintiff, Ernest J. Uarte.

III.

That Stammer & McKnight, attorneys for plaintiff, are entitled to reasonable attorneys' fees in the sum of \$3,426.00, to be paid by the defendant, United States of America, to them out of, but not in addition to, the amount of said judgment in favor of the plaintiff, Ernest J. Uarte.

Let judgment be entered accordingly.

Dated: June 4th, 1948.

PEIRSON M. HALL

Approved as to form. James M. Carter, United States Attorney; Clyde C. Downing, Robert Komins, Max F. Deutz, Assistant U. S. Attorneys; by, Attorneys for Defendant [24]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 4, 1948. Edmund L. Smith, Clerk. [25]

In the District Court of the United States in and for the
Southern District of California
Northern Division
Civil No. 648-N. D.

ERNEST J. UARTE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT IN FAVOR OF PLAINTIFF

This cause came on to be heard on the 25th day of May, 1948, before the Court sitting without a jury; and the plaintiff having appeared personally and by and through his attorneys, Stammer & McKnight by Galen McKnight, Esq.; and the defendant, United States of America, having appeared by and through James M. Carter, United States Attorney, Clyde C. Downing, Robert Komins and Max F. Deutz, Assistant United States Attorneys, by Max F. Deutz, Esq.; and the stipulations of the parties and the evidence and proof of the parties having been heard and considered by the Court; and the cause having been submitted to the Court for its decision; and the Court having found the facts specially, and stated separately its conclusions of law thereon; and its said written findings of fact and conclusions of law having been signed by the Court and filed in said action: [26]

It Is Ordered, Adjudged and Decreed that plaintiff, Ernest J. Uarte, have judgment against the defendant, United States of America, in the sum of \$17,130.05, and for his costs of suit herein in the sum of \$134.92.

It Is Further Ordered, Adjudged and Decreed that the defendant, United States of America, take nothing by its counterclaim.

It Is Further Ordered, Adjudged and Decreed that Stammer & McKnight, attorneys for plaintiff, are hereby allowed reasonable attorneys' fees in the sum of \$3,426.00, to be paid by the defendant, United States of America, to said attorneys out of, but not in addition to, the amount of said judgment in favor of the plaintiff, Ernest J. Uarte.

Dated: June 4th, 1948.

PEIRSON M. HALL

Approved as to form. James M. Carter, United States Attorney; Clyde C. Downing, Robert Komins, Max F. Deutz, Assistant U. S. Attorneys; by, Attorneys for Defendant.

Judgment entered Jun. 4, 1948. Docketed Jun 4, 1948. J. Book 4, page 361. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Jun. 4, 1948. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

NOTICE OF APPEAL TO CIRCUIT COURT OF
APPEALS

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 4, 1948.

Dated: August 2, 1948 at Los Angeles, California.

JAMES M. CARTER

United States Attorney

CLYDE C. DOWNING

Assistant U. S. Attorney

MAX F. DEUTZ

Assistant U. S. Attorney

Attorneys for Defendant and Appellant United States
of America [28]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1948. Edmund L. Smith,
Clerk. [29]

[Title of District Court and Cause]

ORDER EXTENDING TIME TO FILE RECORD
AND DOCKET APPEAL

Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit having been filed herein on August 2, 1948, and

Good cause appearing therefor,

It Is Hereby Ordered that the time for filing the record on appeal with, and docketing the appeal of the within matter in, the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including September 25, 1948.

Dated: August 30, 1948.

BEN HARRISON

United States District Judge

Presented by: Max F. Deutz, Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 30, 1948. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

ORDER FOR CERTIFICATION OF ORIGINAL
EXHIBITS TO THE NINTH CIRCUIT COURT
OF APPEALS PURSUANT TO 75(i) F. R. C. P.

Good Cause Appearing Therefor,

It Is Hereby Ordered that the original exhibits admitted in evidence in the above entitled action, at the trial thereof on May 25, 1948, to wit, Plaintiff's Exhibits No. 2 to 14, inclusive, and Defendant's Exhibits A to H, inclusive, may be certified with the record on appeal to the Ninth Circuit Court of Appeals in lieu of copies thereof.

Dated: September 2, 1948.

BEN HARRISON

United States District Judge

Presented by: Max F. Deutz, Assistant U. S. Attorney. [40]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 2, 1948. Edmund L. Smith, Clerk. [40]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 41, inclusive, contain full, true and correct copies of Complaint for Personal Injuries Arising Out of Tort; Answer and Counter-Claim; Answer to Counter-Claim; Defendant's Objection to Plaintiff's Findings of Fact and Conclusions of Law and Order Overruling; Findings of Fact and Conclusions of Law; Judgment in Favor of Plaintiff; Notice of Appeal; Order Extending Time to File Record and Docket Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal; Designation of Record on Appeal; Supplemental Designation of Record on Appeal; Plaintiff's Designation of Record and Order for Transmission of Original Exhibits which, together with copy of Reporter's Transcript of Proceedings on May 25, 1948 and original Plaintiff's Exhibits 2 to 14, inclusive, and original Defendant's Exhibits A to H, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 22 day of September, A. D. 1948.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy

[Title of District Court and Cause]

Honorable Peirson M. Hall, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Fresno, California, Tuesday, May 25, 1948

Appearances:

For the Plaintiff: Messrs. Stammer & McKnight, by Galen McKnight, Esq., 531 Brix Building, Fresno, California.

For the Defendant: James M. Carter, Esq., United States Attorney, by Max F. Deutz, Esq., Assistant U. S. Attorney, 600 Federal Building, Los Angeles, California. Fresno, California, Tuesday, May 25, 1948. 10:00 A. M.

The Clerk: No. 638, Ernest J. Uarte vs. United States of America.

The Court: You are Mr. McKnight?

Mr. McKnight: Yes, your Honor.

The Court: There is a jury waiver signed and in the file, is there?

Mr. McKnight: No, your Honor. There is no right to a jury in this type of a case, under the Tort Claims Act.

The Court: All right. I was forgetting that. Are you ready to proceed?

Mr. McKnight: Your Honor, I would like to—I think we may shorten it some possibly by making a short statement of our case.

The Court: All right.

Mr. McKnight: If the Court please, this involves an accident which happened at about 11:30 p.m. on July 24,

1946, in Madera County, about 2.6 miles north of the City of Madera.

For convenience and in order to shorten the time, the United States Attorney and I have entered into a stipulation. If I may read that, it will give your Honor a picture of the accident.

The Court: Well, I have it here before me.

Mr. McKnight: Yes, your Honor. [2*]

The Court: The one that was handed to the Clerk, and it will be filed.

Mr. McKnight: Yes, your Honor.

“That the accident referred to in plaintiff’s complaint occurred on or about July 24, 1946, at approximately 11:30 o’clock p.m. on U. S. Highway 99 approximately 2.6 miles north of the City of Madera, in the County of Madera, State of California.

“(2) That at said place, U. S. Highway 99 consists of pavement approximately 22 feet wide, and is divided into two lanes of traffic separated by a single white line, and has shoulders on both sides.

“(3) That prior to the collision, plaintiff was driving a Ford Sedan automobile, owned by him, in a southerly direction on said highway, and either Richard Francis Rogers or Roger Davis Green was driving a Ford Station Wagon, owned by defendant, in a southerly direction on said highway, and Don Arthur McCoy was driving a tractor, semi-trailer and trailer, owned by Golden State Company, Ltd., in a northerly direction on said highway; and that at said time and place a collision occurred, involving all of said vehicles.

“(4) That at said time and place, Richard Francis Rogers and Roger Davis Green were Chief Petty Officers in the United States Navy, and, as such, were employees [3] of the defendant and were acting within the scope and course of their duties and employment; that both of said men were of equal rating in the United States Navy; that defendant had assigned both of said men to the mission they were performing at the time of said collision and had given to both of them the mutual care, custody and control of said Ford Station Wagon and the permission to drive it, and that both of them had mutual rights to drive, operate and use said vehicle.

“(5) That in said collision and as a proximate result thereof, said Ford Sedan automobile was damaged in the sum of \$593.80, and said Ford Station Wagon was damaged in the sum of \$700.00, and said Richard Francis Rogers and Roger Davis Green were killed and plaintiff was injured.

“Dated: May 25, 1948.” [4]

Mr. McKnight: The accident happened at the place referred to. It was at night. It was raining and the pavements were wet.

The Court: Raining in July?

Mr. McKnight: Yes, your Honor, it was raining and the pavement was wet. It was the first rain of the year, the only rain of the summer, and the pavements were very slippery.

The plaintiff was driving his vehicle southerly on Highway 99.

The Court: That is, in a Ford sedan automobile?

Mr. McKnight: That is in a Ford sedan automobile.

The Court: Yes. And Rogers and Green were driving a Ford station wagon owned by the defendant (that is admitted by the answer), in the same direction?

Mr. McKnight: Yes, your Honor. And the evidence will show that the station wagon was proceeding, prior to the accident, behind the plaintiff's automobile, following the plaintiff's automobile.

The Court: Wait a minute, now. That the soldiers—
Mr. McKnight. Sailors.

The Court: —were following the plaintiff's automobile?

Mr. McKnight: They were following it in the sense that they were going in the same direction and they were behind. They were not following immediately behind up until immedi- [5] ately before the accident.

The Court: The Ford sedan of plaintiff ahead of station wagon, both going southerly?

Mr. McKnight. Yes. The highway at that point is a two-way paved highway, with shoulders on each side of it, partly paved and partly dirt.

The Court: The tractor, semi-trailer and trailer, I don't know what you mean by that.

Mr. McKnight: Well, a truck—a tractor and semi-trailer is a combination tractor-trailer, but they are joined together as one vehicle, referred to as a tractor and semi-trailer.

The Court: Well, that is the kind of a truck that they take the big body off the front end and then load it up, wheel it around and fasten it with the trailer?

Mr. McKnight: That is right, and then there was a trailer on behind that combination.

The Court: Well, it was that truck and a trailer?

Mr. McKnight: Yes.

The Court: And they were going northerly?

Mr. McKnight: Yes.

The Court: And the fact that Rogers and Green were employees of the United States and in the Navy is also admitted by the answer, in the course of their employment, and that both men were of equal rating. [6]

Mr. McKnight: They were both chief petty officers.

The Court: What does that mean?

Mr. McKnight: Well, they were both not superior to the other nor under the orders of the other.

The Court: Nor under the control or direction of the other?

Mr. McKnight: No. The purpose of that paragraph is to clarify it in so far as we have been able to determine, and I think as far as anyone has been able to determine, we can't say which of the two were actually driving the station wagon.

The Court: So that the result of this stipulation is that if either of the two were driving, the government is equally responsible, in the event they are responsible at all?

Mr. Deutz: I think that is right, your Honor. They are both government employees.

Mr. McKnight: I think that is true.

The Court: Then, the damages to the automobiles is stipulated.

File this stipulation, Mr. Clerk.

The Clerk: Yes, your Honor.

Mr. McKnight: The damage is stipulated to.

Your Honor, it is the position of the plaintiff and it is our hope that we may be able to prove, to the satisfaction of your Honor, that the plaintiff was driving his automobile [7] on his right side of the road, at a reasonable rate of speed, and that he was guilty of no negligence or no conduct that was the cause of this accident.

In that connection, we shall ask the Court to consider and approve the presumption of due care in so far as it applies to the plaintiff in this case.

The Court: Must I not indulge in that same presumption as to the men who were killed?

Mr. McKnight: I don't believe so, where the defendant is the employer and not the deceased himself. That is the rule in California, and I have found nothing contrary in the Federal Courts.

However, I don't think it will make a great deal of difference, because we will present proof as to the conduct of the driver of the Navy station wagon, and if that proof is insufficient, I assume that we will not have proved our case anyway.

Now, I mention that for this reason: It will appear in this case that there were two men in the Navy station wagon, both of them were killed, and they can't testify as witnesses. There were three men in the plaintiff's automobile, the plaintiff himself and two passengers. The proof will show that both of the passengers in the plaintiff's automobile were sleeping at the time the accident happened or immediately before it happened, and at least while part of it was [8] occurring, and their testimony is of minor value to the case, because they were asleep when the things occurred which led up to the accident.

The Court: The plaintiff was driving?

Mr. McKnight: The plaintiff was driving.

The plaintiff received a very severe head injury and he had a complete amnesia for a period of months preceding and after the accident, and including the space of the accident. That will be proved not only by his own testimony, but by the testimony of the doctor who had him under care after the accident; that he had no memory

at all and has no memory at all of how the accident happened or any of the facts leading up to the accident.

The driver of the truck that was going north was not killed. He does remember those things which he saw and the things which he heard, and can give us some enlightenment on the subject, but, he is the only witness, to our knowledge, who can do that, and, as any witness in any case, of course, he didn't see everything and his memory on some things is imperfect. His wife was with him and might be of some assistance, although I don't think she saw even as much as he did.

There was another automobile load of people, a colored man and his wife and several children, who were parking along the side of the road at the exact place where the accident [9] happened; in fact, the plaintiff's automobile, when it ended up, just barely struck this other car, but, all of the occupants of that car were sound asleep and none of them can testify as to how the accident happened.

So, we have a little bit of an unusual situation here, in that we have eight or ten people who might have been witnesses, and none of them can be considered as actual eye-witnesses to the accident but the one, the driver of the truck.

The Court: A lawyer's usual prayer for witnesses was answered in this case, but rather negatively, wasn't it?

Mr. McKnight: That is right, your Honor. I point that out to the Court for this reason: Now, for that reason, we are going to have to rely upon the physical facts, what was found there after the accident, upon the testimony of Mr. McCoy, the driver of the truck, and by other witnesses who can tell as to the conduct of the Navy station wagon, of its speed, and so forth, at points prior to the accident, but not at the immediate scene of the accident.

We will show the damage to the vehicles; we will have photographs with testimony, and there is sufficient evidence—and I say this not for effect upon the Court, because we are not trying it before a jury and your Honor has heard exaggerated statements many times, and I don't mean this as exaggerated, under all of the evidence that we have here, [10] I say sincerely to your Honor that I have an abiding conviction that this accident was caused solely and entirely and alone by negligent speed in driving on the part of the driver of the station wagon. I have to prove that by physical evidence from which inferences may or may not be drawn, within the judgment of your Honor, and upon the testimony of an unwilling and hostile witness, and I say that advisedly, because I don't want to mislead the Court.

Mr. McCoy, the driver of the truck, is not personally hostile. He is a gentleman in every way. He is an adverse party in another suit that is pending in the State Court. His employer is an adverse party in another suit. He is represented in the other case by his own counsel.

Mr. Deutz: You have to correct that, counsel. I don't believe they are adverse parties. I believe they are co-defendants.

Mr. McKnight: He is, according to the Supreme Court of California, an adverse party, but in this case, I treat him as an adverse party because somebody caused it and each would like to have somebody else blamed, and the Supreme Court of the State of California has said that he is an adverse party.

The Court: He is adverse to everybody.

Mr. McKnight: He is adverse to everybody except to himself and his employer. He has been subpoenaed. He has come in at the request of the government, who actually wanted [11] him also, but he is in a position, I

think, of what Rule 43b intended as an unwilling and hostile witness, and it will be necessary to prove my case with that type of a witness, which makes it rather difficult, and I start this case knowing that.

I call your Honor's attention to that so that you will not feel that we are circuitous when we go into all these surrounding details, because that is what we have to do, and I believe, when it is all in, your Honor will feel as I do—if I am wrong, I lose the case—but, that is the test that I have before me. It is the test I knew I had before me when I filed this action, and I would not be here unless I believed it. I may be entirely wrong, and your Honor may so consider it, but that will express the manner in which the case will be presented.

The Court: Thank you very much, Mr. McKnight.

Mr. Deutz: I think the Court should be aware of one or two things in evaluating the testimony.

Mr. McKnight has spoken of his abiding conviction in the plaintiff's case, in this instance, and I would like to point out to the Court that there was formerly a co-defendant in this action, the Golden State Company, Ltd.

The Golden State Company, Ltd. was dismissed from this action and that leaves the United States as the only party, and I might say that it is the position of the government that the United States is the plaintiff's last straw and they [12] are going to try to make a haystack of this straw, so there is just that question that I think should be evaluated.

The Court: Of course, I don't think that has any effect as to the weighing of the evidence, Mr. Deutz, because it would be a poor lawyer, indeed, who had a client who had suffered severe injuries, that did not join everybody that might possibly be liable, in any cause of

action, and the Golden State Company is not out of the case because the plaintiff wanted him out.

Mr. Deutz: The Golden State Company was dismissed on jurisdictional grounds, which is a contention that has been offered by the government in cases of this type all over the country. It is all because that merely the United States will defend an action for itself, alone, and not be coupled with another co-defendant defending it in the same action.

The Court: Well, that is the law of the case; Judge Yankwich has decided that and I will feel that I am bound by his decision in connection with the matter, regardless of what my personal feelings might be.

There appears to be no authority for the decision by any of the higher courts, particularly by this Circuit, in connection with the matter, and there may be some doubt that they will agree with the ruling that the Judge made in this case, and there are numerous decisions where inseparable controversies have been permitted to be tried. [13]

Mr. Deutz: One other observation: As far as Mr. McCoy is concerned, the government requested the Golden State Company to have Mr. and Mrs. McCoy appear in court. The appearing of those persons here to testify was on a mutual understanding that we would bring the witnesses from Oakland, and that they would bring the witness from the Imperial Valley. And they are not necessarily adverse witnesses in that sense.

The Court: Well, all the witnesses that are here, now, whether they were subject to the jurisdiction of the Court before, they are at this moment, and they are ordered to remain in attendance upon the Court until excused by the Court.

All right. Call your witnesses.

Mr. McKnight: Your Honor, Mr. Deutz and I have more or less together prepared a very rough diagram of the scene of the accident. It does not purport to be to scale or to be exactly in proportion.

The Court: That is what is referred to as a schematic diagram, is that it?

Mr. McKnight: I think that description would suit it very well, your Honor, and with the understanding that it is not to scale and that it is not completely in proportion, but that it is only illustrative of the situation there, may it be introduced as Plaintiff's Exhibit 1?

The Court: It will be marked as Plaintiff's Exhibit 1. [14] and I take it you will have a photograph made of it?

Mr. McKnight: Yes, sir, for your Honor's benefit. I assume it is very clear.

The Clerk: Shall I mark it?

The Court: The Clerk will mark it Plaintiff's Exhibit 1, the drawing on the blackboard.

(The blackboard drawing referred to was marked Plaintiff's Exhibit No. 1.)

Mr. McKnight: These white lines represent the main paved edge of the highway, and then there are some small paved shoulders on each side.

The Court: How wide are they?

Mr. McKnight: I understand they are five or six feet on each side.

The Court: On each side.

Mr. Deutz: I understand from Sergeant Gill that the highway that is paved is approximately 22 feet wide and there are 7 feet of paved shoulders on each side and dirt shoulders further than that.

The Court: Yes. The sketch was silent as to the shoulders. That is 7 feet on each side, that is of paved shoulders?

Mr. Deutz: That is right.

The Court: So-called pavement. 7 and 22 feet, that is 29 feet, plus 5 feet of dirt shoulder? [15]

Mr. McKnight: No. Your Honor, the dirt shoulder is indefinite. It just goes off until it gets into the field.

Mr. Deutz: That would be 22 feet plus 14 feet.

Mr. McKnight: 7 feet on each side.

Mr. Deutz: So the total width would be approximately 36 feet feet, that is, the pavement.

The Court: All right.

Mr. McKnight: The edge of the paved shoulders are represented by the irregular lines.

The Court: The irregular line?

Mr. McKnight: On each side.

The Court: The dotted line down between the pavement, I suppose, is the painted strips?

Mr. McKnight: Painted white line.

The Court: Painted white line?

Mr. McKnight: Yes, and these lines over here (indicating on blackboard sketch) represent the Southern Pacific Railroad tracks.

The Court: How far is it from the pavement to the Southern Pacific track?

Mr. McKnight: I can't answer that, your Honor.

The Court: 50 or 60 feet? You don't know, you can't say?

Mr. McKnight: I can't say.

The Court: All right. [16]

Mr. McKnight: And this square represents a block railroad signal which is only important in the case as

that certain objects were placed with reference to that after the accident happened.

The Court: I see. There is just another question: Maybe you can agree on it. Is the road area on either side of the paved and shoulder portions level, or is the shoulder—the road itself built up so that there is a slight depression on each side of the pavement there?

Mr. McKnight: Well, I couldn't answer that accurately. The officer will be here and we will also have a photograph of it, your Honor, and I think that will probably explain it.

Mr. Deutz: I believe that it will develop it is level, but we do have a photograph.

Mr. McKnight: I can't stipulate to anything on that.

The Court: By the way, you have a large number of photographs here?

Mr. McKnight: Yes, your Honor.

The Court: Well, just hand them to the Clerk and have them marked for identification, will you?

Mr. McKnight: Yes, sir.

The Court: In the order in which you will want them.

Mr. McKnight: Well, I haven't them segregated in order, your Honor.

The Court: You don't? [17]

Mr. McKnight: I do not. Some of them I may not even want to use, as unimportant.

The Court: Well, have them all marked exhibits sooner or later, for identification, and then they will be here and you can keep the record straight.

Mr. Deutz: May we enter into that further stipulation on the authenticity of the record from the proceedings at Madera?

Mr. McKnight: There was a trial at Madera in a case brought by the heirs at law of the deceased sailor boys and the defendants were the Golden State, Mr. McCoy and Mr. Uarte.

The Court: The plaintiff here?

Mr. McKnight: The plaintiff here. That case resulted in a non-suit in favor of the Golden State and Mr. McCoy and a hung jury as to Mr. Uarte's case. We have a transcript of that, which may be used by either counsel at the trial as a record for purposes, I take it, of refreshing memories or impeachment, and we are willing to stipulate that the record that we have here is an authentic transcript of that trial.

Mr. Deutz: And may be used for such purposes as are admissible in this Court.

Mr. McKnight: Yes.

The Court: All right. [18]

Mr. McKnight: Also, immediately after the accident, the Deputy District Attorney of Madera County went to the scene of the accident and interviewed some of the witnesses, before a shorthand reporter from his office. We have transcripts of those statements, and I think it can be further stipulated, for purposes of convenience, that those are true and correct transcriptions of the statements made by those witnesses at that time, under those circumstances, and a few minutes after the accident happened, and that they may be used in this Court by either party for such purposes as are admissible under the law.

The Court: It is so stipulated?

Mr. Deutz: It is so stipulated.

The Court: Very well.

Mr. Deutz: As long as counsel made the statement as to the outcome of those cases at Madera, I believe your

Honor should be better informed, that the matter is up on appeal before the District Court of Appeal and a decision is expected shortly.

Mr. McKnight: I assume that a judgment or determination of that case has no importance here.

Mr. Deutz: It has no bearing on this case.

The Court: No, it hasn't, the fact that everybody is expecting a decision shortly in their favor.

The Clerk: Your Honor, these photographs have been [19] marked as Plaintiff's Exhibits 2 to 12, inclusive, for identification.

(The photographs referred to were marked Plaintiff's Exhibits Nos. 2 to 12, inclusive, for identification.)

Mr. McKnight: Mr. Deming.

LAWRENCE DEMING,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Lawrence Deming.

The Clerk: And your address?

The Witness: 914 West 6th Street, Madera, California.

Direct Examination

By Mr. McKnight:

Q. Mr. Deming, you are an officer of the California Highway Patrol, are you not?

A. Yes, sir, I am.

Q. Located where? A. In Madera County.

Q. And were you so engaged on July 24, 1946?

A. I was. [20]

(Testimony of Lawrence Deming)

Q. How long had you been with the California Highway Patrol at that time?

A. I started with them September, 1944.

Q. And as an officer of the Highway Patrol, did you have occasion to go to the scene of the accident and investigate it, on July 24, 1946?

A. I did.

Q. Will you state what time you received the call to go to that accident?

A. We received the call from the radio station at approximately 11:35 p.m.

Q. And at what time did you arrive at the scene of the accident?

A. Approximately 11:50 p.m.

Q. Were you alone or did someone go with you?

A. Officer Pimley was with me.

Q. Is Officer Pimley now with the Highway Patrol?

A. No, sir.

Q. Was any other officer of the Highway Patrol there when you arrived? A. No, sir.

Q. Did any officer of the Highway Patrol arrive about the same time that you did or soon thereafter?

A. We called for Sergeant Gill.

Q. And did he then go to the scene of the accident? [21] A. Yes, he did.

Q. While you were at the scene of the accident, did you observe the pavement, observe the vehicles that were there, and make certain measurements? A. I did.

Q. Will you state to the Court what vehicles you found there that appeared to have been involved in this accident?

A. May I refer to the notes that I took at the time, Judge?

(Testimony of Lawrence Deming)

The Court: You may do so.

By the way, you stipulated about this truck and trailer. There are all kinds and phases of them.

Mr. McKnight: We will have photographs of it, your Honor.

The Court: Well, have you got one here now? If you are going to talk about these things on the Ford and the sedan and the truck, I would like to keep those in my mind.

Mr. McKnight: Counsel, do you have any objection if—

Mr. Deutz: I have no objection. I believe I have examined all those photographs, and I would like to stipulate that that truck and trailer is 57 feet long.

The Court: 57 feet. Well, that gives us an idea of what kind of a truck and trailer it was.

Mr. McKnight: As a matter of record, I would like to have the evidence, because I have no personal knowledge of [22] it.

The Court: I understand.

Mr. McKnight: There is one here you haven't seen, counsel. Plaintiff's Exhibit No. 2 for identification is a photograph of the station wagon.

The Court: After the accident?

Mr. McKnight: After the accident. We have none before the accident.

The Court: Yes.

Mr. McKnight: Plaintiff's Exhibit No. 7 for identification is a photograph of the truck and trailer.

The Court: Of the truck and trailer.

Mr. McKnight: Plaintiff's Exhibit No. 3 is a photograph of the Uarte Ford sedan as it appeared after the accident.

(Testimony of Lawrence Deming)

The Court: And the car on the other side here is the car where the colored people were?

Mr. McKnight: That is right.

The Court: All right.

Mr. McKnight: And Plaintiff's Exhibit No. 11 for identification is a photograph taken the next day of the highway, just to give your Honor an idea of the locale.

The Court: The block signal is shown over here (indicating).

Mr. McKnight: I had not noticed that, but it may be. [23] No. The block signal would be on the other side of the road.

Mr. Deutz: What is the last number?

Mr. McKnight: 11.

The Court: Very well. I can keep those in mind, now, when hearing the testimony.

Mr. McKnight: I will withdraw the last question, to save looking it up.

Q. What vehicles did you find there at the scene of the accident that appeared to have been involved in this accident?

A. Well, there was one Peterbilt tractor, semi-trailer and a trailer, and a Ford station wagon, another Ford sedan, a late model sedan, and a Model A Ford sedan. That semi, your Honor, I might clarify it for you. A semi is a trailer that rests on a part of the vehicle drawing it.

The Court: Yes.

The Witness: Whereas, the trailer doesn't.

The Court: I see the picture, and I am familiar with the type, now. I did not know what they called them before. They were all trucks to me.

(Testimony of Lawrence Deming)

Q. By Mr. McKnight: Now, did all of these vehicles appear to be damaged? A. They did.

Q. Will you tell the Court the position in which you found the truck and trailer, if we may refer to it as that, [24] counsel—

The Court: Well, have him identify those pictures that I looked at here, now, and if these are the pictures of the cars that he described and the condition you describe them to be in when you arrived there.

Q. By Mr. McKnight: Officer Deming, I will show you Plaintiff's Exhibit 7 for identification and ask you what that is, if you recognize it.

A. That shows the truck, semi and trailer involved in the accident.

The Court: That picture was taken after your arrival?

The Witness: Yes, it was, your Honor.

The Court: By either you or your—

The Witness: By Sergeant Gill.

The Court: And that picture is a true representation of the position of the truck and trailer when you arrived?

The Witness: It is, your Honor.

Q. By Mr. McKnight: And of its condition?

A. Yes, it is.

Mr. McKnight: We ask that it be introduced into evidence, if your Honor please, as Plaintiff's Exhibit next in order.

The Court: Well, it will take the identification number.

Mr. McKnight: As Plaintiff's Exhibit No. 7. [25]

Mr. Deutz: No objection.

The Clerk: Plaintiff's Exhibit No. 7 admitted into evidence.

(Testimony of Lawrence Deming)

(The photograph heretofore marked Plaintiff's Exhibit No. 7 for identification was received in evidence.)

Mr. McKnight: I neglected to show counsel which one this was.

Mr. Deutz: That is all right.

The Court: The next one you showed me was the station wagon.

Mr. McKnight: Well, if I may, I would just like to keep—

The Court: I don't care.

Mr. McKnight: —these more or less in groups as to the various vehicles.

Q. I show you here Plaintiff's Exhibit No. 4 for identification, and I will ask you what that is, if you recognize it?

A. That shows the rear end of the trailer as it was when I arrived at the accident.

Q. That is the same vehicle that is in Plaintiff's Exhibit 7? A. Yes, it is.

Q. The one you just testified to?

A. Yes, it is. [26]

Q. And there is a body of a person underneath that vehicle. Did you identify that person?

A. Later we identified him, yes.

Q. And who was it?

A. It was one of the occupants of the Navy station wagon.

Q. Do you remember which one, what his name was?

A. We later identified him as Richard Francis Rogers.

Q. And is this a true representation of the conditions as you found them there at the time you arrived?

A. Yes, it was.

(Testimony of Lawrence Deming)

Mr. McKnight: We ask that this be introduced as Plaintiff's Exhibit No. 4.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 4 admitted in evidence.

(The photograph heretofore marked Plaintiff's Exhibit No. 4 for identification was received in evidence.)

Q. By Mr. McKnight: I show you a third photograph, which is Plaintiff's Exhibit 8 for identification, and which is another view of the truck and trailer, and ask you if that is a true and correct representation of the condition of those vehicles and their positions on the highway as you found them when you arrived at the scene of the accident? A. Yes, it is.

Mr. McKnight: We ask that it be introduced as Plaintiff's [27] Exhibit No. 8, your Honor.

The Court: Admitted.

The Clerk: No. 8.

(The photograph heretofore marked Plaintiff's Exhibit No. 8 for identification was received in evidence.)

Mr. McKnight: May I pull this over in this area, your Honor (indicating blackboard with drawing thereon)?

The Court: All right.

Mr. McKnight: Mr. Deming, will you step down here, please?

The Court: Just a moment.

On your Exhibit 4, right at the head of the body is a large object. Can you identify what that is?

The Witness: That was a block of wood, your Honor, I believe.

The Court: A block of wood?

The Witness: Yes.

(Testimony of Lawrence Deming)

The Court: And the others are tools?

The Witness: Yes.

The Court: A jack?

The Witness: Yes, sir, a jack.

The Court: Strips of wood?

The Witness: Strips of wood.

The Court: Metal?

The Witness: Metal. [28]

The Court: That came from the trailer?

The Witness: It came—Well, I wouldn't say where they came from.

The Court: And they were strewn on the pavement in that fashion?

The Witness: Yes.

The Court: You did not ascertain where that jack came from?

The Witness: No, sir, I didn't, your Honor.

The Court: Nor the block of wood?

The Witness: No.

The Court: All right.

Mr. McKnight: May I see that, your Honor? I wasn't putting any significance on it.

Q. Did you see that jack in that position when you first arrived, or do you have any independent recollection of it?

A. As I recollect, the jack and the block of wood were not there.

The Court: When you first arrived?

The Witness: When I first arrived. They were brought from the truck. We were going to jack the truck up.

The Court: Oh, in order to extricate the body?

(Testimony of Lawrence Deming)

The Witness: And then we had to wait until the coroner arrived. [29]

The Court: All right.

Mr. Deutz: To avoid confusion, I think we can stipulate that that block and jack were put there after the accident happened.

Mr. McKnight: Well, I have no knowledge one way or another, your Honor.

The Court: Well, he testified that they weren't there, now.

Mr. McKnight: They are of no significance to me.

The Court: But I didn't know. They might be—

Mr. McKnight: By the way, before we get onto the position of those cars, you showed me pictures of the Ford and station wagon. What are those exhibit numbers?

Mr. Deutz: They are mixed up now, your Honor.

The Court: I will find them.

Mr. McKnight: What I intended to do, if it meets with your Honor's approval, would be to place and show the photographs of each vehicle together, and then go to the next one.

The Court: Oh, all right. Very well.

Q. By Mr. McKnight: Do you remember this block signal, Mr. Deming? A. Yes, I do.

Q. And its relative relationship to the position of these vehicles? A. I do. [30]

Q. Would you take a piece of chalk and place the position of this truck and trailer as it appeared there on the highway, when you first saw it, keeping in mind, if you will, that each one of these lanes of traffic, according to our stipulation, is about 11 feet in width—I mean, so that it will give some degree of proportion to your posi-

(Testimony of Lawrence Deming)

tions—and if you desire to look at Plaintiff's Exhibit No. 7 for refreshing your memory, I don't think there will be any objection.

A. Well, I was going to refer to my diagram that I made that night.

Mr. McKnight: All right. Use your diagram.

The Court: You have your diagram there before you?

The Witness: Yes.

The Court: All right.

The Witness: Do you wish to see it?

The Court: No, no, no. The government has seen it. Have you seen it?

Mr. Deutz: Yes.

The Court: All right. Well, let me look at this diagram. Maybe you can save a lot of drawing around here.

Mr. McKnight: I have never seen it, your Honor, it so happens.

The Court: Well, look at it and then show it to me.

The Witness: That was made up from the originals, your [31] Honor.

The Court: You made the originals?

The Witness: They were pretty well scribbled that night. We made the originals and then drew this up.

The Court: Oh, then you redrafted this?

The Witness: Yes, that is right.

The Court: When you had more time?

The Witness: That is right.

Mr. McKnight: Your Honor, I have not objection to the use of this in evidence, unless the witness has.

The Court: Well, you can have photostats made of it. Have you a photostat machine here, Mr. Clerk?

(Testimony of Lawrence Deming)

The Clerk: No, your Honor.

The Court: Let me see it. I don't mean to suggest that you shouldn't try the case the way you wish to try it, but it seems to me this would save an awful lot of drawing.

Mr. McKnight: It would.

The Court: Then, here is another diagram here which shows skid marks and everything else. It seems to me if you could have photostat of those made—

Mr. Deutz: I may have a photostat of that, your Honor.

The Court: —it would seem to me to be exceedingly convenient.

Mr. McKnight: It would serve my purpose.

The Court: And it would serve your purpose to elicit [32] from this witness the testimony he is about to give and save a lot of time.

Mr. McKnight: Yes, your Honor.

The Court: Is there a photostat place in Fresno?

The Clerk: I think so, your Honor.

Mr. McKnight: May we ask the officer if there would be any objection—

Mr. Deutz: I have a photostat of that, your Honor.

The Court: Is this a typical government photostat so that you have to have an extra pair of microscopic glasses to read them?

Mr. Deutz: No. These are very legible, your Honor. They do a pretty good job.

The Court: Are these extra?

Mr. Deutz: No, they are not extra. They are my own copies, but if they will speed matters up, you can use them.

(Testimony of Lawrence Deming)

Mr. McKnight: Would there be any objection to using the originals in evidence, Mr. Deming, with the understanding that we would have photostats made and return the originals made by you?

The Witness: No. You can check with my boss, Mr. McKnight, Sergeant Gill.

The Court: Is there any objection to that, Sergeant Gill?

Capt. C. K. Gill: No. I would like to go over with [33] them and watch them when they are made, because there is no doubt, we will have to go in court again on the matter.

The Court: You want to be able to testify or have someone testify that that has been in your possession all the time?

Capt. Gill: You are right.

Mr. McKnight: Mr. Deutz, could we use a photostat in evidence?

Mr. Deutz: That is the only one I have. I have no objection to your using it in evidence, if you so desire. There is no conflict so far as we are concerned on the officer's testimony.

The Court: Very well. So, if you wish, Mr. McKnight, you can go with the officer at noon and have photostats made.

Mr. McKnight: I don't want to do it. I have other things to do during the noon recess.

Capt. Gill: If the officer wants to copy it off at noon, an exact copy of that, they can have our copy and then we keep the original.

The Court: Well, the photostat, this is the one we need.

(Testimony of Lawrence Deming)

Mr. Deutz: Your Honor, supposing they testify from that and then, if this is necessary for the record, then you can use this.

The Court: Well, he has to have a copy. [34]

Mr. Deutz: Suppose, for the record, you introduce this copy, give it back to me and you can testify from that one.

The Court: We can't give it back to you if it is in evidence.

Mr. Deutz: I mean, give it back to me for my use during the trial.

The Court: Oh, it is available for anybody's use.

Mr. Deutz: That will save a lot of confusion. I would like to check it.

The Court: Maybe, Mr. McKnight, the officers this noon could get this done and you could pay them for it.

Mr. McKnight: Yes, your Honor. I could do that. Anyway, that is the quickest and most convenient.

The Court: And then you have available an extra photostatic copy of it, so it is here. In the meantime, let these be marked so I can be looking at them.

Mr. McKnight: They don't have to be marked, I guess.

The Court: And when you get them, get white photostats so I can read them.

Mr. McKnight: If they are available, your Honor.

The Court: This noon, will you get that photostated, Mr. Officer, and present the bill to Mr. McKnight and he will pay it, pay you for it?

The Witness: Yes. [35]

The Court: You don't have to take it out now. Both of them there. We are going to come to the other one in a minute or somebody is.

(Testimony of Lawrence Deming)

Mr. McKnight: Then, we ask that the two diagrams made up by the officers from their observations and measurements at the scene of the accident be introduced in evidence as plaintiff's exhibits next in order.

The Court: 13.

Mr. McKnight: Plaintiff's Exhibit 13.

The Clerk: Plaintiff's Exhibit 13 in evidence.

The Court: They will be marked and immediately returned to the officer so he may testify from them and get them photostated this noon and return the photostats this afternoon.

Mr. McKnight: Yes, your Honor.

The Court: Will you do that?

The Witness: Yes, your Honor.

(The diagrams referred to were marked Plaintiff's Exhibit No. 13, and were received in evidence.)

Mr. McKnight: They are both the same exhibit, I assume?

The Court: Yes.

The Clerk: Yes, 13 in evidence, two sheets.

Mr. McKnight: All right. You may again take the witness stand, if you will.

(Witness returns from blackboard to witness stand.) [36]

Q. By Mr. McKnight: Now, Officer, will you state for the record the distance from the front of the trailer to the rear of the station wagon as you measured it there that night?

A. From the right rear of the station wagon south to the right front of the trailer, we measured it 40 feet 8 inches.

(Testimony of Lawrence Denning)

Q. Well, what is the distance as you measured it from the rear of the trailer to the left front of the Ford sedan?

A. From the left—

The Court: From the nearest portion of the trailer to the Ford?

Mr. McKnight: Well,—

The Witness: That is right, from the left rear of the trailer, that is the nearest portion to the Ford, to the left front of the Ford sedan, was 93 feet 10 inches.

Q. By Mr. McKnight: What was the distance from the white center line to the left front corner of the Ford sedan?

A. The left front corner of the Ford sedan to—west to the white center line was 31 feet 10 inches.

The Court: 31? It says 32, 11 here.

The Witness: From the left front of the green Ford sedan to the white center line—

The Court: To the white center line, 32, 11, Does your diagram show that? [37]

The Witness: 31 feet 10 inches, your Honor.

The Court: Let me see the diagram. It says 32 feet 11 inches. This must be another diagram.

The Witness: This was drawn from the original.

Mr. Deutz: I did not compare all of the figures. I compared most of them.

The Court: Well, it is 31 feet 10 inches?

The Witness: 31 feet is what I had.

The Court: This is a photostat here.

Q. By Mr. McKnight: What is the distance from the white center line to the left rear of the Ford sedan?

A. From the left rear of the Ford sedan west to the white center line is 24 feet 8 inches.

(Testimony of Lawrence Deming)

Q. Did you look at the highway to determine if there were any marks left upon the surface of the highway by any of the various vehicles involved in the accident?

A. We did.

Q. When you arrived at the scene of the accident, what was the condition in so far as weather was concerned?

The Court: What was his last answer to the last question?

Mr. McKnight: "We did."

The Witness: We did look for marks on the pavement.

The Court: Did you find any?

The Witness: I didn't find any. [38]

The Court: What have you marked here, "Gouge Marks"?

The Witness: That is—At the time we arrived, we found no marks. Those marks were found later.

The Court: You mean the next day?

The Witness: No. These marks, I believe, you are referring to, your Honor, we found those later on in the evening.

The Court: Oh, later on in the evening?

The Witness: Yes, after we had a chance to really look around.

The Court: What do you mean by gouge marks?

The Witness: They are made by a sharp instrument, possibly by a sharp instrument. They dig into the pavement.

The Court: Were they fresh?

The Witness: So far as I could see, they were.

The Court: Did they appear to you to be freshly made?

The Witness: They were there, your Honor. It is pretty hard to say whether they were fresh, due to the wetness of the road.

(Testimony of Lawrence Deming)

The Court: What were they, double marks here, like you have them?

The Witness: Yes, they were just about an arc.

Mr. Deutz: Which set of marks, gouge marks, are those?

The Witness: They are southwest of the green Ford sedan. [39]

The Court: I don't see any other set that appears. They appear to be the only ones indicated here.

Mr. Deutz: I believe the second photostat will show them.

These are southwest of the Ford sedan?

The Witness: Yes.

Mr. McKnight: On the first page of the exhibit, if your Honor please, they are right in here (indicating).

The Court: Yes. Well, those are the ones I am talking about, but I don't see any other gouge marks indicated.

Mr. McKnight: I think they are on the other page.

The Court: On either page.

Mr. McKnight: These here (indicating), your Honor.

The Court: Oh, I see now.

Mr. McKnight: Now, we are talking to these which were the closest to the position of the Ford sedan at the present time.

The Court: And the most southerly?

Mr. McKnight: And the most southerly of all the gouge marks that were found there.

The Witness: That is right.

The Court: Did they appear to be made by metal? I mean, was it the rim of a wheel?

The Witness: I couldn't say, your Honor. Just these two distinct gouge marks in the pavement made by a sharp [40] instrument.

(Testimony of Lawrence Deming)

The Court: Well, how long were they?

The Witness: That I couldn't say, how long they were. They weren't over a foot, if I recollect now.

The Court: There were two, parallel?

The Witness: That is right. They were as close as I can remember, about six inches apart.

The Court: All right.

Mr. McKnight: I realize that this is asking, in a sense, for your conclusion, but I will put it this way:

Q. At the time you looked at them, noticed them and put them down on your diagram, did it appear to you, to the best of your ability, to describe them, that they were fresh marks and not old marks?

A. Well, as I say, Mr. McKnight and your Honor, it was raining at the time we were taking these measurements, and it is pretty hard to tell whether they were made fresh or old ones. They were there, so we put them in.

The Court: Well, this was concrete pavement?

The Witness: That is right.

The Court: You have seen practically broken concrete and some broken concrete?

The Witness: Yes.

The Court: Were they put in with that idea in mind?

The Witness: Yes. [41]

The Court: But you couldn't reach a conclusion?

The Witness: We saw them there and we put them in.

The Court: Excuse me for interrupting.

Mr. McKnight: It is all right.

Q. You have investigated many accidents, have you not? A. Yes, that is right.

Q. It is not uncommon in connection with an accident to see marks of this type, is it?

A. That is right.

(Testimony of Lawrence Deming)

Q. (Continuing) Caused by axles or other parts of a vehicle hitting the pavement during the accident?

A. That is right.

Q. All right. Those marks, these most southerly marks that we have referred to were on what side of the white line?

A. They were east of the white line.

Q. And how far east of the white line?

A. Approximately four feet to the gouge mark, that is the closest to the white line.

Q. You said that they were, according to your memory, something less than a foot long?

A. That is right.

Q. And in the position shown on your diagram?

A. That is right.

Q. I believe you stated that they were southwesterly [42] from the Ford sedan?

A. That is right.

Q. How far were they from the rear of the Ford sedan?

A. From the left rear of the Ford sedan to the north point or north portion of the gouge mark that is closest to the east shoulder was 33 feet.

Q. All right. Did you see some other gouge marks of similar nature on the pavement there that night?

A. Not that night, Mr. McKnight.

Q. These were the only ones you actually saw that night?

A. That is right.

Q. Did you go out there the next day and look for them?

A. We went out the next day.

Q. About what time?

A. I couldn't tell you that. Sometime in the morning.

(Testimony of Lawrence Deming)

Q. Sometime in the morning. And did you find some other gouge marks at that time?

A. We did.

Q. And are they on your diagram?

A. They are on the second diagram.

Q. On the second page of the diagram. And in what lane of traffic were they? [43]

A. They were in the southbound lane of traffic.

Q. In about the position that you have them there on your diagram, is that right?

A. That is right.

Q. Did you make any measurements from these gouge marks to this block signal?

A. Well, at a point opposite the block signal, at a point opposite, west, we stepped off or measured off 77 feet to a point opposite the gouge marks, the most southerly gouge marks. To make it clear, your Honor, from a point opposite the block signal, we measured off 77 feet to the gouge mark south.

The Court: I see. Due south?

The Witness: That is right.

The Court: At right angles?

The Witness: That is right.

The Court: From the block signal.

Q. By Mr. McKnight: Did you make any measurement from the one set of gouge marks to the other?

A. No, we didn't, Mr. McKnight.

Q. You didn't. You say it was raining when you got there, Officer?

A. I don't remember whether it was raining when we arrived or not.

(Testimony of Lawrence Deming)

Q. What was the condition of the highway? You said [44] it was wet? A. It was wet.

Q. Was it slippery? A. Yes, it was.

Q. Do you remember, was this the first rain of the season? A. Yes, it was.

Q. The first rain of the season. From your experience, do you find that the first rain of the season makes the pavement more slippery or less slippery than after it has had plenty of time to be washed off?

A. It seems to be more slippery at that first rain of the season, due to the oil on the road, when the oil makes it slippery.

Q. There that night did you examine the pavement to see if you could find any indications of rubber marks or skid marks? A. Yes, we did.

Q. Upon the pavement? A. Yes, we did.

Q. Were you able to find any?

A. Didn't find a rubber mark of any kind.

Q. And do you know why?

A. Due to the wetness of the road.

The Court: You found none on the road? [45]

The Witness: None at all, your Honor.

The Court: Did you go back there the next day?

The Witness: Yes, we went and we looked, and that is when we found these other gouge marks, and there were no other marks on the road, on the paved road.

The Court: And you found those other skid marks—gouge marks, on the shoulder?

The Witness: That is right.

The Court: Were they on the shoulder?

The Witness: They were on the shoulder.

The Court. And dirt?

(Testimony of Lawrence Deming)

The Witness: And dirt.

The Court: You are going into those later, are you?

Mr. McKnight: No, except as they show on the diagram is all I had in mind.

The Court: Well, on the second page, on your diagram you have "Black Skid Marks," in sort of an arc on the left. Were they skid marks indicating two wheels, a two-wheel skid?

The Witness: Offhand, I don't remember, your Honor.

The Court: That is, double from the truck?

The Witness: I don't remember.

The Court: Or single?

The Witness: I couldn't tell you.

The Court: You don't recall?

The Witness: I don't recall. [46]

The Court: Do you remember as to the other skid marks, the two that lay northerly of those?

The Witness: They were single, I believe.

The Court: The two skid marks, the longer skid marks, did they appear to be parallel at a distance from one another as would be made by one vehicle?

The Witness: Yes, they did.

The Court: And likewise, the other two, or were they closer as if they were made by two vehicles?

The Witness: No. They appeared to have been made by one vehicle.

The Court: The distance between the pairs, that is, between each skid mark in each pair is not indicated here, but from your position on the drawing it appears that the long skid marks are further apart from one another than the short skid marks. Did you intend to indicate that, or do you recall?

(Testimony of Lawrence Deming)

The Witness: I don't recall, your Honor.

The Court: All right.

Q. By Mr. McKnight: Now, Officer, you stated that when you arrived there, you found a station wagon there?

A. Yes, I did.

Q. Did you ascertain what kind of a station wagon it was, that is, did it have a name printed on it or anything?

A. It had. I remember it was just the letters "USN" [47] on the station wagon, printed on the station wagon.

Q. I take it there is no question about it, "U. S. Navy" was printed on the other side?

A. Yes, that is right.

The Court: And it was a Ford?

The Witness: Yes, and it had a number on it.

The Court: Well, they stipulated to it.

The Witness: Five or six numbers, rather.

The Court. Five or six digits?

The Witness: That is right.

Q. By Mr. McKnight: I show you a photograph of what purports to be the Navy station wagon and ask you if that is the condition and position of that Navy station wagon as you found it there on the highway when you arrived there?

A. That is the position I found it in, yes.

Q. And does that truly and correctly represent all conditions as they were at that time in so far as they appear in the picture?

A. Yes, it does.

Mr. McKnight: We ask that it be introduced into evidence, your Honor, as Plaintiff's Exhibit No. 6.

The Court: Admitted.

The Clerk: No. 6 in evidence.

(Testimony of Lawrence Deming)

(The photograph heretofore marked Plaintiff's Exhibit No. 6 for identification was received in evidence.) [48]

Q. By Mr. McKnight: Regarding that last photograph, the camera is facing in a southerly direction, is it not? A. That is right; facing south.

Mr. McKnight: And then, as his Honor was looking at it, the vehicle right directly behind the station wagon is the truck and trailer that you have already described.

Q. I show you another photograph which purports to be the front end of a vehicle and ask you if that is a true and correct representation of that same Navy station wagon as you saw it there at that time?

A. Yes, it is.

The Court: What day of the week was that?

The Witness: I will find it here.

The Court: I have a calendar here. In 1946, you say in July?

Mr. McKnight: July 24, 1946.

The Court: July 24, 1946, was a Wednesday.

The Witness: Wednesday, that is right.

Q. By Mr. McKnight: Did you identify this one?

A. Yes, I did. That is just the one I identified.

Mr. McKnight: We ask that this last photograph be introduced as Plaintiff's Exhibit No. 5.

The Court: In evidence.

The Clerk: No. 5 in evidence. [49]

(The photograph heretofore marked Plaintiff's Exhibit No. 5 for identification was received in evidence.)

Q. By Mr. McKnight: I show you a third photograph which purports to be a photograph of the same vehicle, the Navy station wagon, which, as indicated by the picture,

(Testimony of Lawrence Deming)

was taken in the daylight. Does that, in so far as you can see, truly represent the condition of that vehicle as you saw it there?

A. Yes, it does, except that it was taken in a different place.

Q. In a different location?

A. That is right.

Q. But the condition of the vehicle is the same as you saw it that night?

A. It appears to be the same vehicle.

Mr. McKnight: We ask that that be introduced as Plaintiff's Exhibit No. 2.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 2 admitted into evidence.

(The photograph heretofore marked Plaintiff's Exhibit No. 2 for identification was received in evidence.)

Q. By Mr. McKnight: Now, I show you another photograph of a Ford sedan automobile and ask you if that is a true and correct representation of the Ford sedan automobile, [50] as you saw it there that night, both as to its condition and as to its position on the road?

A. Yes. That is the way I saw it.

Q. Now, the vehicle which is just behind the Ford sedan is the Ford automobile that you described as being occupied by some colored people, is it not?

A. That is right.

Q. Both of those vehicles and everything in that picture truly represents the condition there, in so far as it appears from the picture, is that right?

A. That is right.

Mr. McKnight: And you can even see one of the colored people in the automobile, your Honor. We ask

(Testimony of Lawrence Deming)

that it be introduced into evidence as Plaintiff's Exhibit No. 3.

The Clerk: No. 3 admitted into evidence.

(The photograph heretofore marked Plaintiff's Exhibit No. 3 for identification was received in evidence.)

The Court: By the way, have you subpoenaed the colored people?

Mr. McKnight: No, your Honor.

The Court: Did you talk to them that night?

The Witness: I talked to them that night.

The Court: Did you ascertain whether or not they had seen the accident?

The Witness: They told me they were sleeping on the [51] ground and it started to rain and they climbed into the car and they were just dozing, and they didn't see a thing.

Q. By Mr. McKnight: And, as I understand—this has nothing to do with this case, but they were sleeping between the automobile and the road, isn't that right?

A. No. They had been sleeping on the ground.

Q. Between the automobile and the road?

A. Between where this Ford sedan bumped, and they climbed back into the car.

The Court: Some angels picked them up and put them back in the car.

Q. By Mr. McKnight: They knew nothing about the accident at all?

A. They said they had been dozing and didn't see a thing.

The Court: This is in evidence, No. 3.

Mr. McKnight: All right.

(Testimony of Lawrence Deming)

Q. And I will show you a last photograph, which has been marked Plaintiff's Exhibit No. 11 for identification, which I believe was taken there the next day. Does that correctly represent the physical situation there as it existed on the night of the accident, in so far as positions of trees, roadway, shoulders, and that kind of thing is concerned?

A. I believe so, yes. I was with Sergeant Gill in [52] the photo.

Q. Does that photograph pick up the gouge marks that you have described?

A. As far as I can see, these apparently are the two gouge marks we referred to, but I won't say offhand.

Q. Well, are you sure of that? They look just like spots in the negative, to me.

A. That is right. I wouldn't say. That is the apparent position of those gouge marks in relation to the white line, but I won't say whether they are gouge marks or not.

Mr. McKnight: We ask that it be introduced in evidence as Plaintiff's Exhibit 11.

The Court: No. 11.

(The photograph heretofore marked Plaintiff's Exhibit No. 11 for identification was received in evidence.)

The Court: Are these other photographs all in evidence?

Mr. McKnight: All the photographs are in evidence, your Honor, that I feel of any—

The Court: Do you have any front end view of the Ford, any one at that time of the Ford sedan?

Mr. McKnight: Yes, I have this one.

The Court: Just put them all in evidence.

Mr. McKnight: All right.

(Testimony of Lawrence Deming)

The Court: Ask him if all these pictures were taken [53] at the time and represent what they purport to represent. There are some more there?

Mr. McKnight: Yes, three more.

The Court: Three more.

Q. By Mr. McKnight: I show you three more photographs, which have been marked Plaintiff's Exhibits 9, 10 and 12 for identification, and ask you if those are all photographs taken at the scene of the accident there?

A. I don't recall that one (indicating).

Q. Referring to Plaintiff's Exhibit No. 9 for identification. Then, I will take that one separately, your Honor.

The Court: All right.

Mr. McKnight: Very well,

Q. Regardless of recalling it, Mr. Deming, does that appear to you to represent truly and correctly the front end of the Ford sedan as you saw it there that night?

A. I didn't see the front end. I looked at the Ford sedan from the left side as it rested against the Ford, the '29 Ford sedan. I never did get around to the front of it.

Mr. McKnight: Well, the witness can't identify it. Counsel, do you desire to stipulate that it be introduced into evidence?

Mr. Deutz: May I see it?

Mr. McKnight: It is immaterial to me. [54]

Mr. Deutz: I have no objection.

Mr. McKnight: We introduce it into evidence, if your Honor please, as Plaintiff's Exhibit 9.

The Court: All right. It may be admitted.

The Clerk: No. 9 into evidence.

(Testimony of Lawrence Deming)

(The photograph heretofore marked Plaintiff's Exhibit No. 9 for identification was received in evidence.)

The Clerk: He has that other one there, too.

Mr. Deutz: This one is already admitted.

Mr. McKnight: All right.

The Clerk: Plaintiff's Exhibit No. 11 in evidence.

Q. By Mr. McKnight: Plaintiff's Exhibit No. 12 for identification is simply another photograph taken the next day to show the general characteristics of the roadway, isn't it? A. That is right.

Q. None of the marks or anything show in that, so far as you can find? A. No, I don't—

Mr. McKnight: We ask that it be introduced in evidence as Plaintiff's Exhibit No. 12.

The Court: While you were there, did the wrecking truck come and take any of the cars away?

The Witness: We called the wrecking truck, your Honor but I don't recall them hauling the cars away. We had [55] other things to do.

The Court: I see. It says, "PHOTO BY Sgt. CLARK GILL," who was with you?

The Witness: He was out at the accident that night, too.

The Court: He took the other photographs?

The Witness: Yes.

The Court: It says, "Looking South at Front of"—"Looking," I don't know whether it is "south" or not—"at front of Ford Sedan," and the license number; "Tow car had pulled same about 3 ft. South. On each shoulder of Road." "7-25-46, at 3:37 a.m."

Mr. McKnight: It is satisfactory to me. Is it to you, counsel?

(Testimony of Lawrence Deming)

Mr. Deutz: Yes. I have no objection.

The Court: "My 1452," photograph by Sergeant Gill. Who took that? He took that, too?

The Witness: That is right.

Q. By Mr. McKnight: Plaintiff's Exhibit No. 10 is a photograph of the trailer, is it not?

A. Well, I don't know whether it is the trailer or semi-trailer. I think it is the trailer.

The Court: No. 12 is admitted.

Mr. McKnight: It is either the semi or the trailer.

The Witness: It is one of the pieces of equipment. [56]

The Clerk: No. 12 is admitted.

(The photograph heretofore marked Plaintiff's Exhibit No. 12 for identification was received in evidence.)

Mr. McKnight: We ask that it be introduced as Plaintiff's Exhibit No. 10, your Honor.

The Court: Very well.

The Clerk: No. 10.

(The photograph heretofore marked Plaintiff's Exhibit No. 10 for identification was received in evidence.)

Mr. McKnight: Those are all of them.

The Court: Are those all of them? All the Exhibits Nos. 2 to 12, inclusive, are admitted into evidence.

Mr. McKnight: I think that is all, your Honor.

The Court: Cross examine.

Cross Examination

By Mr. Deutz:

Q. Officer Deming, what type of road is this? Is this a macadam or a concrete road at this point?

A. I believe it is.

(Testimony of Lawrence Deming)

Q. Or black surface?

A. A concrete base.

Q. The top?

A. The top was macadam, I guess they would call it. It isn't a concrete, a smooth concrete. [57]

Q. It is not a concrete surface on top, it is an oiled surface?

A. As I recall, that is right.

Q. Now, these colored people that were in the car that was parked on the side of the highway, did they indicate how long before that they had gotten into the car?

A. No, sir. I don't recall how long they had been there. All I asked them is if they had seen the accident.

Q. Do you know of your own knowledge what time it started to rain that evening?

A. No, I don't; I can't say.

Q. At the time you arrived at the scene of the accident, was it raining at that time?

A. I don't recall that it was raining at the time we arrived at the accident, no.

Q. Had there been a heavy rain at any time that evening?

A. It had rained quite heavily previous to our receiving the call for the accident.

Mr. Deutz: But at one time earlier in the evening.

That is all.

Mr. McKnight: That is all.

The Court: Step down. You get those photostats made and return them, will you, please? Just those two pages.

The next witness. [58]

Mr. McKnight: May I consult with Mr. Deming to tell him where to go? He is from Madera. He may not know the photostating establishment.

The Court: He probably knows more about Fresno than you do.

Mr. McKnight: Maybe.

(Mr. McKnight confers with Officer Deming.)

Mr. McKnight: And get white photostats made. Do you want a copy of those made for yourself?

Mr. Deutz: No. It will not be necessary.

Mr. McKnight: Get about three made.

The Witness: About three of each?

Mr. McKnight: Three of each, yes.

The Court: The next witness.

Mr. McKnight: I will call Mr. Uarte.

The Court: We might have a short recess first.

(Whereupon, a short recess was taken.)

The Court: All right, Mr. Uarte, come forward and be sworn.

ERNEST JOHN UARTE,

the plaintiff herein, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Ernest John Uarte. [59]

The Clerk: And your address?

The Witness: 10346 South Paramount Boulevard, Downey.

Direct Examination

By Mr. McKnight:

Q. What is your age? A. 37, sir.

Q. Are you the plaintiff in this case?

A. Yes, sir.

(Testimony of Ernest John Uarte)

Q. Do you remember this accident that occurred just north of Madera on July 24, 1946?

A. No, sir.

Q. Do you remember anything about it at all?

A. No, sir.

Q. Do you remember where you had been just prior to the happening of this accident?

A. No, sir.

Q. Do you remember anything that occurred or where you were or any event which happened within approximately a month after the accident?

A. No, I don't.

Q. What is the last thing that you remember before this accident happened?

A. The last thing I remember is receiving my discharge from the U. S. Army at Fort MacArthur, and I called [60] up my mother at that time. That is the last I remember.

Q. You have no memory after that at all?

A. No, sir.

Q. Until sometime after the accident occurred?

A. That is right.

The Court: How long prior to the accident was that?

The Witness: I believe that was either in the latter part of November or in the middle of December, your Honor.

The Court: In 1945?

The Witness: Yes, your Honor.

Q. By Mr. McKnight: Is your memory fairly clear as to things that happened before your discharge from the Army?

A. Yes, I remember things I did while I was in the Army.

(Testimony of Ernest John Uarte)

Q. Do you remember where you were, what theatre you were in, and so forth?

A. Yes. I was in the European theatre.

Q. And do you remember before you went into the service, what was your employment?

A. I was working for the Bank of America.

Q. And do you have any memory at all of going back to work for the Bank of America, after you came back from the Army?

A. No, I don't.

Q. Do you have any way of ascertaining whether you had or not? Do you know whether you had, had gone back to work? [61]

A. Yes, I had.

Q. At what branch of the Bank of America?

A. Downey Branch of the Bank of America.

Q. Doing what kind of work?

A. I had charge of the Veterans' Home Loans.

Q. What was the first thing that you remember after this accident?

A. The first thing I recollect after the accident is being in the hospital. I woke up and I was in bed there.

Q. In what hospital?

A. Dearborn, in Madera.

Q. And do you remember about when that was?

A. That was the latter part of August.

Q. Of 19—

A. Of 1946.

Q. Of 1946. And do you know, did you own an automobile?

A. Yes.

Q. At the time this accident happened, you know you owned an automobile?

A. Yes. I owned it.

Q. Do you know who was driving it at the time this accident happened, I mean of your own knowledge, now?

A. No, sir.

(Testimony of Ernest John Uarte)

Q. Do you know who was with you, of your own knowledge? [62] A. No, sir.

Q. Do you know where you had been?

A. No, sir.

Q. When you woke up in the hospital, did you say the latter part of August or the first part of August?

A. The latter part of August.

Q. (Continuing) The latter part of August, sometime approximately a month after the accident, as you have told— A. Yes, sir.

Q. —what was your condition at that time as you yourself were able to determine, I mean, not from what your doctor told you, but what did you know after you began to know things?

A. Well, my right leg was in a traction splint and the right side of my chest was sore. I had scars and bruises on my hands and forehead.

Q. Were you in any pain?

A. Yes. My chest was giving me some trouble.

Q. At that time did you have any pain in your head?

A. No. My head had healed by then, I believe.

Q. Including all of the knowledge that you have now, will you describe to the Court where you were hurt, what injuries you received?

A. My right leg was broken midway between the knee and the hip, and I had seven fractured ribs on the right side, [63] and my right lung was punctured and collapsed, and my skull was fractured and I had a lacerated scalp, and I had bruises on my forehead, nose, hands and my elbows and knees, and I had some chipped teeth.

The Court: Chipped what?

The Witness: Teeth.

(Testimony of Ernest John Uarte)

The Court: Teeth.

Q. By Mr. McKnight: Now, starting at the top, Mr. Uarte, you say you had lacerations on your head, and to the best of your knowledge your skull was fractured—How do you know that, I mean, from what do you testify, what your doctor said? A. Yes, sir.

Q. Or something else—And you said lacerations about your scalp. Will you turn your head just a little way. were those scars that you have there on your head, on the right side of your forehead—

The Court: On the right side of your forehead.

Q. By Mr. McKnight: (Continuing)—Were those received in the accident?

A. To the best of my knowledge, yes.

Q. At least, you had them when you woke up?

A. Yes.

Q. You did not have them before?

A. No. [64]

Q. At that time did they give you trouble?

A. Sure, they did.

Q. In what way?

A. They couldn't heal them. They had trouble, difficulty, in healing the scars, the wounds.

Q. For how long did that difficulty in superficial healing take?

A. They did not heal until I left the hospital sometime.

Q. How long were you confined to the Dearborn Hospital?

A. Over four months; 125 days, it was.

Q. And during all that time were you in bed or were you up and around any part of the time?

A. I was in bed until about the last 7, 10 days.

(Testimony of Ernest John Uarte)

Q. And during that period you were there, what would you say about your memory? I don't mean your memory in so far as the period with reference to which it was completely blank was concerned, but while you were in the hospital, could you remember things that happened, then, clearly and distinctly, or did you have difficulty?

A. I had difficulty. I couldn't remember things. I was later told that friends were in to see me and I would recognize them but as soon as they left the room. I would completely forget that they had been there. [65]

Q. And during that period of time, did you have considerable pain or not?

A. Yes. As I said before, my chest was bothering me quite a bit.

Q. Can you describe the type of difficulty you were having with your chest?

A. Yes, sir. It was a sharp pain. Every time I would take a breath, it felt like a knife was being jabbed into my chest.

Q. Has that ever entirely cleared up or not?

A. No, sir. It still gives me trouble.

Q. And all the time, or just on certain occasions?

A. Not all the time; certain occasions.

Q. Any thing connected with weather or what you do, work or efforts, I mean, is there any way you can describe when it occurs or when it doesn't, or is it just hit and miss?

A. Well, if I exercise, it bothers me, and a change of climate does also.

Q. All right. You say what part of the time of the little over four months you were in the hospital—what part of the time were you able to be up and out of bed?

A. About the last 7 or 10 days, I believe.

(Testimony of Ernest John Uarte)

Q. Before that, what kind of treatment were you given or did they give you, while you were in bed?

A. They had my leg in traction, in a traction splint, [65-A] and—

Q. What is that? Will you describe it?

A. Yes.

Q. Did they hoist it up in the air? A. Yes.

Q. Did you lie flat?

A. Your leg is raised up in the air and they have pulleys—that pulled your foot out toward the front, and then they have pulleys that keep your leg, that pull the top part of your leg back, keeping your bone separated there.

Q. And were you under that kind of treatment at the hospital until the time they let you get up out of bed, at the hospital? A. Yes, yes.

Q. When you were able to get up, during that last week or ten days, were you up, then, all the time, or were you just up and down?

A. The first time I lasted about two minutes, I believe, and they had to put me back in bed because I was about ready to pass out, and then, from then on, it was just longer periods every day.

Q. When you left the hospital, was your leg still in any kind of a cast or not?

A. Yes; it was in a brace.

Q. In a brace? [66] A. Yes.

Q. What kind of a brace?

A. Well, it was a steel brace. It kept me from putting my weight on my leg. There is an attachment to the bottom of my shoe, so that the full weight of my body rested on my hip instead of on my leg.

(Testimony of Ernest John Uarte)

Q. How did you leave the hospital? Did you walk out or did they carry you out on a stretcher or a wheelchair, or how did you leave? A. I walked out.

Q. To what?

A. To a car that my cousin had there, and he took me home. I had a pair of crutches. I was on crutches.

Q. After you got home, were you up all the time from then on, or were you up and down from your bed?

A. I was up and down. I would get up, but then I would have to sit most of the time, because I was very weak.

Q. And how long did that up and down continue, last, would you say, after you got home from the hospital?

A. Oh, I don't remember, as I—about three weeks or so.

Q. And at the end of that time, were you still on crutches or were you able to discard them?

A. Oh, no. I didn't discard my crutches until quite some time later. [67]

Q. About how long?

A. I think it was Mother's Day. I know I gave my mother a scare. I think it was about that time, whatever date that is.

The Court: In 1947?

The Witness: 1947, yes, sir.

Q. By Mr. McKnight: What do you mean, gave her a scare?

A. She thought I was out of my mind.

Q. Well, what did you do?

A. I got out of bed and took off my brace and threw my crutches away. I got tired of wearing them.

(Testimony of Ernest John Uarte)

Q. Then, were you able to get along without them, after that? A. Yes, I was.

Q. Or did you have to get them back?

A. No, I didn't have to get them back.

Q. You didn't take them back after that?

A. No, I didn't.

Q. Are you still wearing the braces?

A. That is when I threw the braces away.

Q. You used crutches as long as you had the braces?

A. Yes, sir.

Q. You say Mother's Day. You mean what day—
Put it this way— [68]

The Court: Well, it comes in May or June—May, usually.

Q. By Mr. McKnight: of 1947?

A. 1947, yes.

Q. And did you finally—Have you ever gone back to work, Mr. Uarte? A. Yes, sir, I have.

Q. What date did you go back to work?

A. I don't recall what day it was, but it was in February, I believe, for part time.

Q. Of what year? A. 1947.

Q. February of 1947? A. Yes, sir.

Q. So, when you went back to work, you were still in braces and still wearing crutches?

A. Yes, sir.

Q. And can you state about when in February, about the middle of the month, or first of the month, or the last of the month, to the best of your memory?

A. I believe it was around the first of the month, but I am not sure, sir.

Q. Around the first of the month.

(Testimony of Ernest John Uarte)

The Court: When did you start working full time?

The Witness: I believe I worked part time for about [69] a month or a month and a half.

Q. By Mr. McKnight: And that started at about the first of February? A. Yes.

Q. And then after that, you worked full time?

A. After February?

Q. No. After about a month and a half, after?

A. Yes, sir.

Q. Then, full time?

A. When I first went back to work, it was only for about an hour a day.

Q. I see. Now, have you counted up at any time the amount of wages that you would have received from the bank during the period that you were not working?

The Court: Can't you and counsel stipulate to that during the noon hour? Is there any question about it?

Mr. Deutz: No. I think we can work that out.

The Court: Why don't you work out a stipulation on that and the doctor bills, if you have them, and hospital bills—

Mr. McKnight: I think we can.

The Court: —whatever they are, because it just takes time to put them in evidence and nobody ever fights about them. I would like to ask him a question on the subject.

Mr. McKnight: Yes, your Honor. [70]

The Court: You said you knew where you were when you were in the hospital?

The Witness: Yes, your Honor.

The Court: Could you remember—Did your mental powers come back fully at that time or gradually?

The Witness: Gradually.

(Testimony of Ernest John Uarte)

The Court: When did you first recover fully your mental powers, or have you fully recovered them now?

The Witness: I don't believe I have. I still have difficulty in concentrating, and I forget.

The Court: Well, do you have any difficulty in recollecting things?

The Witness: Not now, no.

The Court: Not now?

The Witness: No, sir.

The Court: When did you fully recover that quality?

The Witness: That was quite some time after I went to work. I had difficulty when I went back to work. I know I would be waiting on a customer and I would go back, I would look up his records and then I would go back to the counter and forget who I was waiting on.

The Court: About how long, about a month after you went back to work, would you say?

The Witness: It was more than that.

The Court: Two months? [71]

The Witness: It was about three or four months.

The Court: Then, you would say along in the middle of the year, early 1947, your mental faculties so far as memory, regained its normalcy?

The Witness: Yes, I would say about that.

The Court: You now have difficulty concentrating, you say?

The Witness: Yes.

The Court: Well, is the difficulty as a result of physical pain or your power to control your mental processes?

The Witness: Just my power to control my mental processes, I believe. I don't have pain at all times in my head, but I do have a ringing in my head, and when I become nervous, that is when I have most of my difficulty.

(Testimony of Ernest John Uarte)

The Court: When you become nervous?

The Witness: Yes.

The Court: Do you get nervous frequently now?

The Witness: Yes, I do.

The Court: What makes you nervous? I mean, under what circumstances?

The Witness: Just a high tension.

The Court: When you get to working hard?

The Witness: Yes, sir.

The Court: Are you married?

The Witness: No, sir. [72]

The Court: And no children?

The Witness: No children.

The Court: And you haven't been married?

The Witness: No, sir.

The Court: And you live at home with your mother?

The Witness: Yes, and my folks.

The Court: And your father?

The Witness: And my father.

The Court: And sisters and brothers?

The Witness: I have a sister at home.

The Court: Well, do things about the house make you nervous?

The Witness: It is generally my work.

The Court: It is generally your work?

The Witness: Yes, worry about it.

The Court: All right.

Q. By Mr. McKnight: Do you remember things, now, at the present time as clearly and as well as you

(Testimony of Ernest John Uarte)

believe you did before the accident? Do you think you have made a complete recovery of your memory now, or not?

A. Well, I still have trouble in remembering things, although I believe my memory is almost back to normal.

Q. You say you have a ringing, you feel a ringing in your head or in your ears at times?

A. Yes. [73]

Q. Particularly when you get nervous? A. Yes.

Q. Is that accompanied with any pain at all, any type of headache or ache of any kind, or can you describe it?

A. It is just a ringing in my left ear and occasionally I do have a stab of pain in my head, but not very often.

Q. Do you now experience or did you ever, during the last, we will say month or two, so his Honor will know what I mean—Have you ever experienced any feeling of dizziness or nausea or anything of that kind?

A. No, sir, I haven't.

Q. You have not? A. No, sir.

Q. All right: What about these teeth? How many teeth were broken? A. I have four.

Q. Have they been repaired or not?

A. No, they haven't; I haven't had a chance.

Q. Do they give you any pain or not?

A. Yes; when I eat sweets.

Q. Which teeth are they?

A. I have a molar back here that is chipped (indicating). I have a molar there in back that is cut in half (indicating), and this tooth here is chipped (indicating), and I have this tooth here (indicating). [74]

Q. Can I see it? A. Yes.

Q. Those still have to be fixed? A. Yes.

(Testimony of Ernest John Uarte)

Mr. McKnight: There is one item of damage I may have to go into. Possibly I am anticipating. I might ask one or two questions.

The Court: What is that?

Mr. McKnight: He needed nursing care while he was in the hospital and his mother and sister were there, and he has reimbursed them for their actual expenses while they were taking care of him. Would there be any objection to that?

Mr. Deutz: I am afraid I could not stipulate to that.

Mr. McKnight: I anticipated that.

Q. While you were in the hospital, did you require nursing care? A. Yes, I did.

Q. Did you hire nurses for some time?

A. I hired a special nurse for a while, and then my mother and my sister took turns taking care of me. One stayed at night and the other during the day.

Q. Have you reimbursed them for any expenses while they were living in Madera and taking care of you?

A. Yes. I reimbursed them for their hotel expenses.

Q. What was that? [75]

A. It was \$125.00 I gave them.

Q. \$125.00? A. I believe it was.

Q. To refresh your memory, you told me \$175.00.

A. I believe that was it.

Q. Now, which was it? A. It was \$175.00.

Q. You talked about a brace, Mr. Uarte.

The Court: How long were they there?

The Witness: My sister stayed there until I left the hospital.

The Court: Well, how long was that, a month, about?

The Witness: That was four months.

(Testimony of Ernest John Uarte)

The Court: Four months?

The Witness: Yes.

The Court: And your mother was there how long?

The Witness: I believe she was there three or four weeks.

The Court: Other than paying their hotel bill, you paid them no money?

The Witness: No.

Q. By Mr. McKnight: You say it was necessary for you to wear a brace? A. Yes.

Q. What did the brace cost you? [76]

A. \$75.00.

Q. Will you describe to his Honor what the wearing of this brace consisted of after you left the hospital; I mean were you able to take it off and put it on, and handle it yourself, when it was on or not?

A. No, sir. My sister or mother had to take the brace off and put it on. It was rather cumbersome and I couldn't bend my leg.

Q. Was this every time it was put on and off?

A. Yes.

Q. Somebody had to do it? A. Every time.

Q. And when you were walking with the brace, and so forth, were you able to go places alone, I mean locally, so that you could get back for help for taking it off and on, I mean, were you able to go downtown alone or not?

A. No, sir. I wasn't. I wasn't able to walk that far.

Q. And whenever you went any place, did someone have to take you?

A. Yes, my sister usually went with me.

(Testimony of Ernest John Uarte)

Q. If you went out of town, like coming up here to Fresno on any business occurrence, for instance, when depositions were taken in the other case in the State Court, how did you get the brace taken off and on while you were away from [77] home?

A. My sister did it.

Q. And she had to go with you every place you went?

A. Yes, she did.

Q. And you say that lasted clear up until when?

A. Up until about the middle of the year 1947.

Q. That is almost a year after the accident?

A. Yes, it was.

Q. What was your salary at the bank before the accident happened?

A. It was two hundred and seventy—

Mr. McKnight: Oh, we were going to do this at the lunch period—

Mr. Deutz: I would like to hear the answer to that question.

The Court: What is that?

Mr. Deutz: I would like to hear the answer to that question, if I may, your Honor.

The Court: All right.

Q. By Mr. McKnight: What was your salary at the bank? A. \$275.00 a month.

Q. And in the common course of working for a bank like that—

The Court: Like that? For that bank.

Q. By Mr. McKnight (continuing): —For that bank, yes, your Honor. —what was their usual custom in reference [78] to raising salary; I mean, did you have a raise coming annually?

(Testimony of Ernest John Uarte)

The Court: An automatic raise?

Q. By Mr. McKnight (continuing): Automatic or not.

A. Yes; we have one of them once a year.

The Court: All right.

Q. By Mr. McKnight: And what was that automatic raise?

A. That all depends. I would have received around twenty-five or thirty dollars a month.

Q. More, if you had gotten that raise?

A. Yes, I would.

Q. Was or was not that raise prevented by this accident?

A. It was prevented.

Q. When you got back to work, did you go back at an increased salary, or at your old salary?

A. At the old salary.

Q. And you have been working at that salary ever since, or have you had a raise since that one?

A. I had a raise this last January.

Q. That would have been normally the second one?

A. Yes.

Q. And that raise was how much?

A. That was only \$15.00. [79]

Q. After you get to a certain amount, the raise gets smaller, is that right?

A. The reason I didn't get a larger raise is because I was having difficulty in doing my work.

Q. What kind of difficulty?

A. Well, when I went back, I couldn't remember a thing about my work. I had to learn it all over again.

(Testimony of Ernest John Uarte)

Q. Yes. Will you just describe that a little more fully?

A. When I went back to work, I didn't remember anything about my work, I didn't even know what I was doing when I left on my vacation; therefore, the fellow that relieved me had to teach me the work all over again, had to teach me the job because I couldn't do it, and it took quite some time for me to get onto the work; therefore, they didn't feel that I was entitled to a full raise.

Mr. McKnight: I think that is all at this time, your Honor.

The Court: I think we will recess until 1:30.

Mr. McKnight: Your Honor, Mr. Deutz has asked for a medical examination by a physician of his choice and I have agreed to get Mr. Uarte there.

The Court: This noon?

Mr. McKnight: Yes.

The Court: We will recess until 2:00 o'clock then. [80]

Mr. McKnight: Until 2:00 o'clock.

The Court: And do you have witnesses that you wish to take out of order?

Mr. McKnight: I will have at 2:00 o'clock, your Honor.

The Court: Before the cross examination of this witness?

Mr. McKnight: I will have one witness that I wish to take out of order, for this reason, your Honor, if he is here, he is under subpoena. I talked to him on the telephone and he said—

The Court: What I would like to do this afternoon is to be sure to dispose of all the witnesses who are from out of town.

Mr. McKnight: Yes.

The Court: So we won't inconvenience them.

Mr. McKnight: This witness I have in mind, his boy is being shipped back from France and was to arrive today. He is one of the soldiers that fell there, and the witness has refused to honor the subpoena and come in, and I have talked with him and I finally got his promise to be here, and I promised to put him on, then, right off. Now, I don't know whether he will be here or not.

The Court: If he is here, I will see that he is put on right away.

Mr. McKnight: Thank you. [81]

(Thereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, May 25, 1948.) [82]

Fresno, California, Tuesday, May 25, 1948. 2 P. M.
(Trial resumed.)

The Court: You may proceed.

Mr. McKnight: Your Honor, pursuant to the statement I made at the end of the morning session, I would like to call somewhat out of order at this time, if I may, the witness Allen Thomas Roberts.

The Court: Very well. Mr. Roberts, will you come forward, please, and be sworn?

ALLEN THOMAS ROBERTS,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Allen Thomas Roberts.

The Clerk: What is your address?

The Witness: Route 2, Box 186, Madera.

The Court: Is that spelled A-l-l-a-n?

The Witness: A-l-l-e-n.

Direct Examination

By Mr. McKnight:

Q. What is your business or occupation, Mr. Roberts? [83] A. Farming.

Q. How long have you lived and followed that occupation in Madera County?

A. 24 years next September.

Q. Do you know Mr. Uarte? A. No, I do not.

Q. Did you ever meet him in your life?

A. I never did. Well, I did in the trial at Madera, is the first time I ever seen him.

Q. Did you happen to come upon the scene of this accident some time after it happened? A. I did.

Q. And that was approximately somewhere shortly after 11:30 on July 24, 1946?

A. That is right.

Q. Where had you been, Mr. Roberts?

A. On a fishing trip.

Q. And where were you going?

A. Coming home.

(Testimony of Allen Thomas Roberts)

Q. Who was with you?

A. My son and Mr. Kell, Tom Kell.

Q. And as you were driving along, say, from Chowchilla to the place where this accident happened, what were the passengers in your automobile doing?

A. They were asleep. [84]

Q. When you came to the scene of the accident, did you see any vehicles there?

A. Oh, yes, yes.

Q. What vehicles did you notice?

A. Well, I recognized the station wagon and there was quite a few trucks and cars, and if I remember right, there were a couple of stages or buses, whatever you want to call it, several of them.

Q. Did you stop at the scene of the accident?

A. I did not.

Q. What did you do?

A. Well, as I came up there, they were just putting out the flares on the north side and I seen a man walking away, I didn't know who it was, and I slowed down. I seen there was trouble or presumed there was, and that woke Mr. Kell up. He asked me what was the trouble. I said there was a bad accident in front, I think. I said, "Shall we stop?"

He said, "I don't care about it. I don't care about the kids seeing it."

So we pulled to the right, that would be to the west of the highway, in low gear, just eased on by.

The Court: On the dirt?

The Witness: Yes.

The Court: By the trees? [85]

The Witness: Yes—Well, I don't remember whether there were any trees at this particular place or not, but

(Testimony of Allen Thomas Roberts)

anyway, we were on the west side of the highway. I recognized the station wagon there. If I remember right, the motor, the station wagon was headed east across the highway. So we came around very slow. There was a man got up to the side of the car and asked us if he could ride to the phone. I told him he could and I never asked him his name. I asked him, "What is the trouble?"

He said the Navy boys are killed and he said, "There is another boy we think is going to die. We want an ambulance."

I did not ask him who it was, and he didn't even know, and I did not even stop.

Q. By Mr. McKnight: I show you Plaintiff's Exhibit 12, which purports to be a view of that highway in that vicinity where the accident happened, looking south.

A. Yes.

Q. You see there are some trees over there?

A. Yes.

Q. On which side of those trees did you go?

A. Well, I estimate the car went on the west side of the trees. I was clear off on the dirt, in fact of the matter, I was on the edge of the grain field.

Q. You stated a moment ago you recognized this station wagon. Had you seen it before that night? [86]

A. It passed me about a mile and a half or so south of Chowchilla.

Q. How far is that from the place where the accident happened?

A. I should judge it is 10 or 11 miles.

Q. You are quite familiar with that vicinity there, are you? A. Yes, oh, yes.

(Testimony of Allen Thomas Roberts)

Q. And at the time the station wagon passed you, how fast were you traveling?

Mr. Deutz: I object, your Honor. That matter is immaterial, irrelevant and entirely remote. That happened 10 or 12 miles from the accident, and unless the plaintiff can establish that this witness had that vehicle in view up to the point of the accident and can testify to the speed of the vehicle at the time or immediately prior to the happening of that accident, it is too remote. I have these authorities on that point.

The Court: The objection is overruled.

Mr. Deutz: Would your Honor care to hear the authorities that I have on that point?

The Court: I am familiar with them. Objection overruled.

Q. By Mr. McKnight: Approximately how fast were you driving at the time that this Navy station wagon passed [87] you, Mr. Roberts?

A. About 40 miles an hour.

Q. And will you state to the Court in your best judgment how fast the Navy Station wagon was driving at the time it passed you?

A. I judge it was driving anywhere from 70 to 80 miles an hour. I presume it was wide open, the way it was traveling.

The Court: Was it raining?

The Witness: Misting raining.

Q. By Mr. McKnight: Was the highway wet?

A. It was pretty slippery.

Q. And as the station wagon passed you, did it pass on the left side of the road?

A. That is right. It passed to my left.

(Testimony of Allen Thomas Roberts)

Q. And then crossed back to the right side of the road? A. Yes.

Q. Will you describe what happened when it tried to get back on the right side of the road?

A. The station wagon, when it passed me, instead of the back end trailing around, it just slid around, whipped around, the back wheels just skidded around. They didn't trail around, and just skidded around.

Q. And then did it disappear down ahead of you?

A. It went right on out of sight. [88]

Q. And did you ever see it again until the scene of the accident?

A. That is right: I didn't see it until I got to the accident.

Q. Then, continue. Continue on.

The Court: How far north, did you say, of the accident this was?

The Witness: About 10 or 12 miles.

The Court: How long was it before you got to the scene of the accident?

The Witness: I should judge about 12 minutes.

Q. By Mr. McKnight: Did you continue at that speed? A. No, I didn't.

Q. Did you continue along at the same rate of speed, about 40 miles an hour?

A. I continued at the same speed.

Q. When you arrived at the scene of this accident, did you say there were already a considerable number of cars and vehicles there? A. There was.

The Court: Excuse me. How long have you been driving an automobile?

(Testimony of Allen Thomas Roberts)

The Witness: I have been driving ever since about 1919.

The Court: Almost continuously?

The Witness: Yes, sir. [89]

The Court: This car you were driving, what kind was it?

The Witness: It was a station wagon.

The Court: The make?

The Witness: A Ford.

The Court: How long had you had it?

The Witness: It wasn't mine. It belonged to this man, Mr. Kell.

The Court: You had driven that type of car before?

The Witness: That is right.

The Court: During your period of experience in driving, you have had occasion to observe the speedometer from time to time?

The Witness: Yes.

The Court: In the car you were riding in?

The Witness: Yes.

The Court: And notice the vibration of an automobile?

The Witness: That is right.

The Court: At that time, you weren't looking at your speedometer, were you?

The Witness: Well, no.

The Court: That is, when they passed?

The Witness: No. I just looked at it after they passed and I just think—

The Court: You looked at it after they passed?

(Testimony of Allen Thomas Roberts)

The Witness: Yes, and I think, my goodness, boys, you [90] are going to crack up. That is the remark I made to myself.

The Court: Well, that can go from the record. It may be stricken.

The Witness: Yes.

The Court: I understand. And during that period since 1919, that is almost 30 years, isn't it?

The Witness: Yes.

The Court (continuing): You have had occasion to drive cars in California?

The Witness: Yes.

The Court: And on that road?

The Witness: Yes. I am very familiar with the road north and south on that route.

The Court: And different types of vehicles?

The Witness: Yes.

The Court: All right.

Q. By Mr. McKnight: Were there any crossroads or anything between the point where you saw this station wagon pass you and the scene of the accident that would have—

A. Yes, there were intersections and everything. However, there was nothing to cause me to slow down.

The Court: There weren't any boulevard stops?

The Witness: Well, I presume there was on the road some places, yes. [91]

The Court: That is, entering the highway?

The Witness: Entering the highway.

The Court: Not on the highway?

(Testimony of Allen Thomas Roberts)

The Witness: No boulevard stops on the highway, no.

Q. By Mr. McKnight: So you kept the general rate of 40 miles an hour right to the scene of the accident?

A. That is right.

Q. You say when you had arrived at the scene of the accident, there had been time enough elapse for a number of vehicles to already get to a stop?

A. Yes; there were quite a few stopped there, then.

Q. Can you estimate, to the best of your ability, how many vehicles were there by the time you arrived there?

A. I should judge there were 20 or 25 different vehicles there, trucks and cars there; there was quite a bunch of them.

The Court: Headed south?

The Witness: They were headed in all directions.

The Court: About how many were headed in the direction you were going?

The Witness: That I couldn't say definitely. I didn't even take time to count them, but there were quite a few, several of them had stopped.

The Court: Well, you would know if you saw 50 automobiles? [92]

The Witness: Yes.

The Court: Or if there were more than ten?

The Witness: There wasn't 50 there.

The Court: About what is your best recollection?

The Witness: Well, I judge, the best I remember, there must have been 8 or 10 headed south.

The Court: Headed south?

The Witness: Yes.

The Court: Very well.

Q. By Mr. McKnight: And did you say that flares had been put out? A. They had.

(Testimony of Allen Thomas Roberts)

Q. Had the putting out of flares—Were they already out?
A. Yes.

Q. Had the putting out been completed?

A. That is how come me to slow down. This man evidently, from the way it happened, he just put the last one out north of the accident and was walking back and I slowed down, I cut my speed down then.

Q. Do you remember any other vehicle passing you from the time that this vehicle passed you to the scene of the accident?

A. Well, I don't recall. It seemed to me like there was one passed over there right close to Veranda. [93]

Q. Do you have any definite memory of that?

A. No, I don't.

Q. Now, all the way from this place where the station wagon passed you to the place of the accident, did it continue to be wet and slippery?

A. It was still raining.

Q. Still raining all the way. As the station wagon passed you, did you see anything written on the sides of it?

A. I seen something, "Navy Recruiting," or something like that. I don't remember. I just call it a Navy station wagon.

Q. Did you recognize it as a Navy wagon?

A. Yes.

Q. As it passed you?
A. Yes.

Q. And you recognized it as the same one when you got there?
A. Yes, sir.

Mr. McKnight: That is all.

The Court: Cross examine.

(Testimony of Allen Thomas Roberts)

Cross-Examination

By Mr. Deutz:

Q. Mr. Roberts, I believe you stated that when this Navy station wagon passed you, it was about 10 or 11 miles [94] north of the scene of the accident, is that correct?

A. That is right; that is right.

Q. After that station wagon passed you, how long did you have it in view?

A. Well, I didn't have it in view very long. It was dark and cloudy, of course, raining. I would say probably, with my lights, maybe a quarter of a mile, you know; I could see a faint—

Q. And then it disappeared from your view?

A. That is right.

Q. When that station wagon passed you, did you notice what its color was?

A. Yes. If I remember right, it was a blue, kind of a—it was a two-toned color, kind of, I think, if I remember right.

Q. Two-tone in what way, the fenders darker than the body? A. Something like that, yes.

Q. Or vice versa?

A. I wouldn't say definitely just exactly what that was.

Q. Were there two tones of blue?

A. No. There weren't two tones of blue, I don't think.

Q. You don't know definitely what the color was?

A. No. The only reason I come to identify the wagon [95] was the lettering on the side.

Q. What lettering did you see on the side?

(Testimony of Allen Thomas Roberts)

A. Something like "Navy Recruiting"; something like that.

Q. "Navy Recruiting"? A. Yes.

Q. Those words? A. Yes.

Q. Did you notice a license number? A. No.

Q. Did you notice any number on the side of the vehicle at all?

A. I didn't pay any attention to that. I don't recall any.

Q. Did you get a glimpse of the men riding in the vehicle at all?

A. I seen the men, yes, when they passed, I noticed the men, I noticed they were Navy men.

Q. How many men were in that vehicle?

A. Just two.

Q. Just two. And they were both in the front seat? A. Yes.

Q. Did you ever have occasion to identify those individuals— A. No. [96]

Q. —so that you could see them later? A. No.

Q. What I meant to say was—I misstated the question—At the time of the accident, you didn't leave your car, you didn't see the bodies?

A. No. I seen the bodies—Well, I seen the covering that was on the bodies in the street.

Q. Then, you couldn't positively state that the men that were lying on the ground were the men you had previously seen in the station wagon?

A. No, I could not positively state.

Q. Could you positively state that the station wagon you saw at the accident was the identical station wagon that you saw passing you?

A. Yes, I could.

(Testimony of Allen Thomas Roberts)

Q. On what basis?

A. Well, from the color—

The Court: It is argumentative; it is argumentative.

Q. By Mr. Deutz: You travel that highway a great deal, don't you? A. Yes.

Q. Along back in July, 1946, were there a considerable number of Army and Navy station wagons on the highway? A. Sure.

Q. There were considerable Navy and Army installations [97] in this area? A. Yes.

Q. And during the course of the evening, do you recall passing any other Navy station wagon?

A. There wasn't any other Army or Navy station wagon passed me that afternoon or that evening.

Q. But do you usually encounter a number of them on the road? A. I didn't that evening.

Q. As a rule, did you encounter them in your driving?

A. Yes, as a rule, I did.

Q. After this vehicle passed you 10 or 11 miles from the scene of the accident and disappeared from your sight about a quarter of a mile beyond, you had no further view of that vehicle— A. That is right.

Q. —thereafter? A. That is right.

Q. You have no way of stating, or you are unable to state, what the speed of that vehicle was at any time closer to the scene of the accident than what you have just given? A. No, sir.

Mr. Deutz: That is all.

Mr. McKnight: That is all. Your Honor, may Mr. Roberts be excused? I explained to your Honor the situation [98] that he is in. I would appreciate it if he may go back to his family.

(Testimony of Allen Thomas Roberts)

The Court: Well, I am wondering whether or not, for the purpose of this record, there ought to be a question asked of this witness concerning that, if counsel cares to ask it. I don't know. I think it would probably be permissible, on the grounds it goes to show either bias or prejudice or lack of it.

Redirect Examination

By Mr. McKnight:

Q. Mr. Roberts, it is my understanding that your son's body arrived from overseas yesterday?

A. That is right.

Q. He was killed months ago during the war, is that right?

A. In '44.

Q. And I assume that your family is quite grieved?

A. Yes. My wife is very upset over it.

Q. And you have requested me to put you on out of turn?

A. That is right.

Q. And get you away just as soon as we can, so you can get back to your family?

A. That is right.

The Court: Have you ever had any experience or [99] arguments with the Navy?

The Witness: No, sir.

The Court: Very well.

Q. By Mr. McKnight: What branch of the service was your son in

A. He was in the Infantry.

The Court: All right. You may be excused.

Mr. McKnight: Thank you, Mr. Roberts.

The Witness: Thank you very much.

The Court: The next witness.

Mr. McKnight: I will call Mr. Daniels.

W. R. DANIELS,

called as a witness by and on behalf of the Plaintiff,
having been first duly sworn, was examined and testified
as follows:

The Clerk: Your full name, please?

The Witness: W. R. Daniels.

Direct Examination

By Mr. McKnight:

Q. And your address? A. Oakland.

The Court: And your street address?

The Witness: 608 Catron Drive. [100]

The Court: Catron Drive, Oakland 3?

The Witness: Oakland 3.

Q. By Mr. McKnight: What is your business or
occupation? A. A truck driver.

Q. And by whom are you employed?

A. Golden State Company.

Q. By whom were you employed on July 24, 1946?

A. That same company.

Q. What were you doing on the night of July 24,
1946?

A. I was proceeding towards Los Angeles.

Q. Driving? A. Driving, yes.

Q. And what kind of equipment were you driving?

A. The same kind of truck and trailer arrangement
that was—

Mr. McKnight: Speak up.

The Court: I can't hear you, Mr. Daniels.

The Witness: I am sorry. Well, the same kind of
equipment that Mr. McCoy had.

Q. By Mr. McKnight: You were both employed by
the same employer? A. Oh, yes.

(Testimony of W. R. Daniels)

Q. And you were proceeding south and he was proceeding north? [101] A. Yes.

Q. Did you come upon the scene of this accident on that evening sometime in the vicinity of 11:30 p. m.?

A. That is right; I did.

Q. When you arrived at the scene of the accident, what vehicles did you see?

A. Well, there were quite a few.

The Court: About what time did you get there, did you notice?

The Witness: It was around in the neighborhood of 11:30, 11:40.

The Court: 11:30, between then and midnight?

The Witness: Yes.

Q. By Mr. McKnight: What vehicles did you see there, and I am speaking now of vehicles that appeared to have been involved in the accident?

A. Well, the first thing that I saw was this Golden State semi and trailer that was across the road, and then this station wagon that was all cracked up was this side of the semi.

Q. By "this side," do you mean north?

A. Toward me, next to me, yes.

Q. From the way you were coming? A. Yes.

Q. Did you see the Ford sedan? [102]

A. Not right then, no.

Q. But you did while you were there? A. Yes.

Q. Now, Mr. Daniels, had you seen that Navy station wagon at any time before you arrived there at the place where the accident happened?

A. Just a few minutes before that.

(Testimony of W. R. Daniels)

Q. Will you state to the Court where you were when you saw the Navy station wagon the first time?

A. Well, just after passing Veranda Junction, just a few miles north of there, about, I believe it was, four or five miles.

Q. Four or five miles north of what?

A. North of the scene of the accident.

Q. And were you at that time driving your equipment?

A. Yes.

Q. In what direction? A. I was coming south.

Q. And what was the condition of the weather at that time?

A. Well, it was nasty, it was sloppy, raining.

Q. Was the highway wet or dry?

A. Very treacherous.

Q. Was it wet or dry? A. Wet. [103]

Q. Wet. Was it slippery? A. Very.

Q. And where was the Navy station wagon when you first saw it?

A. Well, it overtook me. When I actually saw the Navy station wagon was when it passed me.

Q. How long have you driven vehicles, Mr. Daniels?

A. Well, over 25 years.

Q. How long has that been your business, truck driving? A. All of that time.

Q. All of that time. And has all of that time been upon the highways of this state or not?

A. No; in numerous states.

Q. But during that time you have continuously driven upon the highways? A. Yes, that is right.

Q. Have you learned, do you believe, to make a fair estimation of speed of vehicles that pass you?

A. I beileve so.

(Testimony of W. R. Daniels)

Q. Will you tell the Court approximately how fast you were driving when the Navy station wagon passed you?

A. We were running in the neighborhood of 35 or 40 miles an hour; the current flow of traffic for the past hour or so previous to that time had been from 35 to 45 miles an hour. [104]

The Court: And they slowed down because of the treacherous road?

The Witness: Yes.

Q. By Mr. McKnight: And that was your speed, approximately, at that time?

A. My speed at that time was approximately—I had just passed Veranda Junction and had slowed down and was picking up a little bit, and we were between 35 and 40 miles an hour, I think.

Q. All right. Will you tell the Court the nature of the road at the place where the station wagon passed you, that is, was it a straight road there or not?

A. There is a slight turn just this side of Veranda Junction and there is a double line approaching a little rise.

Q. Is that what you describe as an "S" turn?

A. A mild "S" turn there.

Q. And what kind of a line divided the two pavements where the station wagon passed you?

Mr. Deutz: I object.

The Court: Objection overruled.

A. There is a double line on the last part of this "S" turn approaching this little rise.

The Court: The double line—One of them was a solid line?

(Testimony of W. R. Daniels)

The Witness: Well, it is a solid line up to the last [105] part of this "S" turn, and then there is a double line from there over the rise.

Q. By Mr. McKnight: You mean both lines are solid; you mean one was not broken? A. No.

Q. They were both solid lines? A. Yes.

Q. And did the double line exist at the exact point where the station wagon passed you?

A. Yes, it did.

Q. In order to pass you, did the station wagon go onto the left side of the highway and cross the double line?

A. Yes, he went against—

Mr. McKnight: Speak up.

The Witness: He went against oncoming traffic.

Q. By Mr. McKnight: The question was, Did he pass over the double line on the left side of the highway?

A. Yes, he did, clear over the double line.

Q. From your experience and knowledge of your own experience and all other factors which you took into consideration, will you estimate to this Court to the best of your ability the speed of the station wagon as it passed you?

Mr. Deutz: I object to that question.

The Court: Your exception is preserved.

Mr. Deutz: Very well, your Honor. [106]

The Court: And the objection is overruled.

A. The approximate speed I judge was between 70 and 80 miles an hour. It was terrific.

The Court: In other words, he was going almost twice as fast as you were in passing you?

(Testimony of W. R. Daniels)

The Witness: Oh, it was "zip" and gone, and he pinched in between me and a rig ahead of me.

The Court: There was a car ahead?

The Witness: There was a rig.

The Court: A truck? You mean a truck?

The Witness: Yes, and then he slowed down.

The Court: How far ahead of you was the other truck?

The Witness: Well, less than a hundred yards.

Q. By Mr. McKnight: And you say as he came in between you, he slowed down some?

A. He slowed down some.

Q. Then, what did he do?

A. Then he let one more pass.

Q. In which direction was the other truck going, or the other car?

A. There was a car going north.

Q. A car going north?

A. And he let that car by, and as soon as he passed, he swung out onto the other lane again and passed this rig at the crest of the rise. [107]

The Court: Was there still a double line at the crest?

The Witness: Yes.

The Court: In other words, you saw him make two passes over the double line?

The Witness: That is right.

Q. By Mr. McKnight: And what happened? Could you see anything happen with reference to his rear wheels as he—

Mr. Deutz: Just a moment. I object to that as a leading question, your Honor.

(Testimony of W. R. Daniels)

Mr. McKnight: Well, I will withdraw it and put it a different way.

The Court: Well, it is leading, but the objection is overruled.

Q. By Mr. McKnight: What did you see in reference to the station wagon as he took up speed?

A. He used so much throttle, he spun his wheels and there was a spray, it was like steam, spinning his wheels.

Q. Did you continue on to the place of the accident at an average speed that you have already designate?

A. The current flow of the—

Q. I am speaking about you, now.

A. Well, I stayed behind this rig that was ahead of me.

Q. Did you continue on—

A. We maintained about the same speed all the way [108] from there to the accident.

Q. And when you arrived at the scene of the accident, had it already happened?

A. Oh, yes, it had already happened.

Q. Were there other vehicles already stopped there?

A. There were some, yes.

Q. Or not? A. There were some.

Q. You don't know just how long before it happened?

A. I could not say.

The Court: Counsel, is there some law about this double line?

Mr. McKnight: No. Your Honor, it is the law that a vehicle upon the state highway—

The Court: Is that in the Motor Vehicle Code?

Mr. McKnight: No. The Motor Vehicle Code gives the Department the right to make such a regulation.

(Testimony of W. R. Daniels)

The Court: And they have a regulation that there shall be a double line and there shall be no passing over the double line?

Mr. McKnight: That there should be no passing over the double line.

Mr. Deutz: I want to point out, if your Honor please, that this is so remote. Any passing over a double line at such a distance could not possibly have anything to do with [109] what happened at the scene of the accident.

Mr. McKnight: It is only for the purposes of showing the circumstances leading up to the accident.

The Court: Objection overruled.

Q. By Mr. McKnight: When you arrived at the scene of the accident, what did you do first?

A. I first went to Don McCoy, the driver of the Golden State rig that was involved in the accident and asked him if he was—

Q. Don't give the conversation you had at that time. You talked to him, is that it?

A. My first concern was to see he was all right.

Q. And you determined that? A. Yes.

Q. Then, what did you do after you determined that Mr. McCoy and, I assume, his wife were all right?

A. Well, set out flare pots.

Q. And from the time that you arrived at the scene of the accident until you got all these flare pots out, how many minutes, if any minutes, would you say elapsed?

A. Well, I don't believe that I had been there more than 10 or 15 minutes.

Q. Do you think it took you that?

A. I don't think it took more than about 10 minutes from the time I arrived at the scene of the accident until I [110] set the flare pots out.

(Testimony of W. R. Daniels)

The Court: Until you completed setting them out?

The Witness: I believe so.

The Court: The police had not then arrived, when you set out the pots?

The Witness: I believe there was a Highway Patrol arrived right about that time; I am not sure. It has been quite a while ago.

The Court: Very well.

Mr. McKnight: I think that is all.

Cross-Examination

By Mr. Deutz:

Q. You were about four or five miles north of the scene of the accident at the time the Navy station wagon passed you, is that correct? A. That is right.

Q. And you were proceeding about 35 to 40 miles an hour? A. That is right.

Q. Did you state that you had slowed down to approximately that speed, due to the wet slippery weather?

A. Not immediately—but quite a while before, the traffic had all slowed down.

Q. What type of equipment were you driving? [111]

A. I was driving a Peterbilt tractor with a semi-trailer.

Q. A semi and a trailer?

A. No. It is a tractor and a semi-trailer.

The Court: In other words, you just had the truck part of it; you didn't have the second part back of it?

The Witness: I did not have a trailer. I did not have a four-wheel trailer.

Q. By Mr. Deutz: What was the weight of that vehicle, approximately?

(Testimony of W. R. Daniels)

A. Well, approximately, I had 30,000—between twenty-five and thirty thousand. Tare weight, we would run perhaps 35,000 to a load.

Q. Do you know that there is a maximum regulation for speed of vehicles of that kind?

Mr. McKnight: We object to that, your Honor, as incompetent, irrelevant and immaterial, and not within any issue in the case, the Golden State Company not being a party defendant at the present time, your Honor.

The Court: Well, it is like proving an alibi in a criminal case and always trying to prove that somebody else did it. I think it is admissible.

Mr. McKnight: Of course, this wasn't the vehicle involved in the accident.

The Court: He didn't ask him— [112]

Mr. McKnight: Very well. May I add to the objection?

The Court: Well, I think it is immaterial so far as this witness is concerned.

Mr. McKnight: And also, it would be a legal conclusion of the witness, your Honor.

The Court: Yes, it would, so far as this witness is concerned.

Q. By Mr. Deutz: This station wagon that passed you, did you identify it as to color?

A. Well, they all look pretty much the same to me.

Q. What color was it?

A. I believe it was a conventional Navy blue-grey like, with this veneer, this varnished veneer like most of these station wagons are.

Q. Single color or two-tone?

A. It would be two different colors.

(Testimony of W. R. Daniels)

Q. Two different colors of paint, two different colors of the blue? A. I wouldn't say about the blue.

Q. Of course, there is a natural wood finish body on it? A. Yes.

Q. But outside of that, was it just one color or two?

A. I wouldn't say.

Q. How do you identify it as the Navy Vehicle? [113]

A. Because I saw "U. S. Navy" on the side and a number.

Q. Do you recall the number?

A. No. Then, as it got past me and in front of me, then I saw the "U. S. Navy" on the back and a number on that.

Q. Did you see anything that indicated that it was the Recruiting Service?

A. I couldn't be positive, because it was of no concern to me at that time.

Q. Did you get a look at the men in the vehicle?

A. No, certainly not. I merely saw that there was more than one in it. I couldn't say whether there were three or four, or how many.

Q. When the Navy station wagon passed you, you say you saw a spray of water fly up, as it cut in front of you?

A. Not as he passed me. As he cut in front of me and as he passed the rig ahead of me.

The Court: As he turned to pass the rig ahead of you?

The Witness: Yes; he used so much throttle, he actually spun his wheels.

(Testimony of W. R. Daniels)

Q. By Mr. Deutz: Did he do that quickly?

A. My goodness sakes, yes. He didn't pull out steadily. He zipped around.

Q. In your experience of long years of driving, have [114] you had occasion to have wheels spin on you on a wet, greasy road? A. Certainly I have.

Q. Do you find that a usual occurrence?

A. We take precautions not to let it happen.

Q. And it happens to you?

A. Not if you use care.

Q. Have you had it happen to you with the type of vehicles which you were riding in?

A. I don't recall. Perhaps it has.

The Court: What usually causes that?

The Witness: Too much throttle.

The Court: Too much power?

The Witness: Yes.

The Court: The sudden application of too much power?

The Witness: That is right.

Mr. Deutz: That is all.

Mr. McKnight: That is all.

The Court: The witness may be excused?

Mr. McKnight: Yes, your Honor, so far as I am concerned.

Mr. Deutz: Oh, I just want to ask one more question. You don't need to return to the witness stand.

(Testimony of W. R. Daniels)

The Court: All right.

Q. By Mr. Deutz: How long after the station wagon [115] passed you did it disappear from your view?

A. Well, he was out of sight as soon as he got in front of the rig ahead of me.

Q. And you never say the station wagon at any other time from that point to the scene of the accident?

A. No, sir.

Mr. Deutz: That is all.

The Court: About how long in lapsed time was it from the time until you got to the scene of the accident, do you recall?

The Witness: Approximately five or six minutes, I believe.

The Court: Very well. Call the next witness.

Mr. McKnight: Mr. McCoy. This witness is the witness I desire to call under Rule 43(b).

The Court: Well, he hasn't given any demonstration of hostility yet. I don't know. He may not.

Mr. McKnight: I don't think he will, your Honor. I found one case that held that you had to announce that before the harm is done, and therefore that is the reason I was doing it.

The Court: Very well. [116]

DON A. McCOY,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Don A. McCoy.

The Clerk: Your address?

The Witness: 10942 Apricot Street, Oakland 3, California.

Mr. Deutz: Your Honor, I don't object to the reference to Section 43(b), but, he is calling him as his own witness and is bound by his testimony unless there is some showing of adversity.

The Court: Well, let me see the rule. The bailiff or somebody will get me a copy of it. Will you see if you can get me the Rules of Civil Procedure?

Mr. McKnight: Your Honor, may I, while the rule is coming in, state for the record the basis of my calling the witness under that Section? I covered it at least partially.

The Court: Well, I understand it, but you better state it for the record.

Mr. McKnight: That is what I had in mind.

This witness, if your Honor please, was originally a defendant in this suit. He has now been dismissed, and is not an adverse party in this suit. However, he is an adverse [117] party, to wit, a co-defendant in another action which has been filed in the Superior Court, which has been tried once, and which, in all probability, will be tried again—

The Court: In what Superior Court?

Mr. McKnight: Of Madera County.

(Testimony of Don A. McCoy)

The Court: Of Madera County.

Mr. McKnight: —having resulted in a non-suit as to one defendant and a hung jury as to the other defendant. He was represented by his own counsel.

I have not had full opportunity to discuss his testimony with him. True, I did see him this morning and talk to him for about a minute or two. Under those circumstances, I feel that his interests are different than ours and I would like the privilege of examining him under that Section, although Mr. McCoy has always been a gentleman and has showed no great impartiality to anyone so far in the case.

Mr. Deutz: I would like to point out, your Honor, that in so far as Mr. McCoy's testimony is concerned, it has been clearly covered at the previous trial, so counsel for the plaintiff is not completely unaware of the testimony to be given in this case.

Mr. McKnight: Not if it is the same, your Honor.

The Court: I think under the rule it is permissible. It states a party may interrogate and unwilling or hostile witness by leading questions. There isn't any evidence of [118] any hostility on the part of this witness on this trial here. There isn't any controversion of the statement that he is yet a party to an action now pending against him arising out of the same incident which causes this action. The record shows that he was originally a party to this action, and the rule also permits the calling of an adverse party.

I think from the fact that he is a party to the action pending in the State Court, that the Court would be justified in indulging the presumption that he would be an

(Testimony of Don A. McCoy)

unwilling witness, because unwillingness arises from a great many things, and it is natural that a person should be unwilling to take the witness stand and confess any error or commit any error on their part.

I think, moreover, that he can be cross examined under Rule 43 by virtue of the fact that he was a party to this action.

While it is true that a motion to dismiss was partially granted as to all defendants except the United States, and as to this defendant an order was made doing so, and while it is true that that is the law of this case, as far as this Court is concerned, because the ruling was made by another judge of this court, in this case, nevertheless, it is not beyond the realm of possibility that some higher court, by the time they get through with it, may put him back in as a party, and, in the meantime, the plaintiff in this case should [119] not be deprived of a right which is given to him under the rule, and for that reason the motion is granted and the objections to it are overruled.

You may proceed under Rule 43(b).

Direct Examination

By Mr. McKnight:

Q. Mr. McCoy, what is your business or occupation?

A. Truck driver.

Q. By whom are you employed?

A. Golden State Company, Ltd.

Q. By whom were you employed on July 24, 1946?

A. Golden State Company, Ltd.

Q. Was a vehicle driven by you involved in this accident that we are discussing here in this case?

A. Yes, sir.

(Testimony of Don A. McCoy)

Q. What kind of a vehicle was that?

A. That is a Peterbilt tractor with a double axle semi pulling a four-wheel trailer.

Q. And in what direction were you driving before the accident occurred? A. North.

Q. On Highway 99?

A. On Highway 99, yes, sir.

Q. About two and a half miles north of Madera? [120]

A. That is right, yes, sir.

Q. As you proceeded northerly and before the accident happened, but in the immediate vicinity of the accident, was it raining? A. It had been, yes, sir.

Q. Do you remember whether it was at the exact moment of the accident or not? A. No, sir.

Q. You mean you don't remember, or that it wasn't?

A. I don't remember.

Q. You don't remember. At that time and place, was the highway wet? A. Yes.

Q. Was it slippery? A. Yes.

Q. At approximately what speed were you driving as you drove northerly? A. 40 miles an hour.

Q. And on which side of the white line were you driving?

A. The east side of the white line going north.

Q. That would be your right-hand side of the line?

A. The right-hand side of the highway.

Q. At that point was it a single white line or a double white line? [121]

A. A single white line.

Q. And approximately how far from the white line would you say the left side of your vehicle was being driven? A. I would say approximately two feet.

(Testimony of Don A. McCoy)

Q. Now, did you see either of the other vehicles involved in the accident at any time before the accident actually occurred?

A. No, I couldn't say that I saw the vehicles. I saw the lights of them.

The Court: Coming toward you?

The Witness: Toward me, yes, sir.

Q. By Mr. McKnight: And when you first saw those lights—I am referring now to the first time you noticed or saw them or recall seeing them—did you see one set of lights or two?

A. I saw one set and then I saw the other set following after. There is a slight raise in the road, a crest, approximately 750 feet, or around 250 yards, from the scene of the accident, and as they came both over the top, I saw both of them.

Q. You saw both sets of lights? A. Yes.

Q. Now, at that time, without attempting to state a distance in feet, can you state definitely whether there was actually a distance— [122]

The Court: Let me see the pictures.

Q. By Mr. McKnight (continuing): —between those two vehicles, between the two sets of lights?

A. Yes.

Q. There was. Could you state to the Court how far one of those sets of lights was behind the other, or do you have any idea of that?

A. You mean when I first saw them?

Q. When you first saw them? A. No, sir.

Q. You couldn't give any distance? A. No, sir.

Q. You just know that there was definitely a distance between them? A. Yes, sir.

(Testimony of Don A. McCoy)

Q. Can you give any estimate of the speed of those vehicles, at that time? A. No, sir.

Q. All right. As these vehicles continued toward you and as you continued toward them, as you came together, did both sets of lights remain in your view, or did one of them disappear from view?

A. I didn't follow you.

Mr. McKnight: Read the question.

The Court: Well, what he is trying to get at is, did [123] one vehicle start around the other?

The Witness: No, sir.

The Court: Go around?

The Witness: No, sir.

The Court: Or did one vehicle get so close behind the other one that you couldn't see it?

The Witness: The vehicles came close and then one pair of headlights was blacked out.

The Court: I see.

Mr. McKnight: All right. That is the answer. That is what I wanted to get, your Honor.

Q. And did you at any time prior to the actual collision see both sets of lights again?

A. No; no, I wouldn't say that I did; no, sir.

Q. As the two vehicles continued to go, to go forward, your attention, I assume, was focused upon the first set of lights? A. Yes, sir.

Q. Did you afterward determine which vehicle that was, the first set of lights?

A. You mean after the accident?

Q. Yes.

A. Well, by presuming which car hit me first, I presumed that that was the first car; that is what my assumption was. [124]

(Testimony of Don A. McCoy)

Q. That was which car?

A. That was a green Ford sedan.

Q. That was a Ford sedan. And when you first saw these lights coming and as they continued toward you, on which side of the white line were they?

A. They were on the west side going south.

Q. That is, both sets of lights?

A. Yes, coming until they got within a certain distance of me.

Q. And what distance is that that you refer to?

A. I would say approximately about 50 feet.

Q. Then, will you, if you can, just tell the Court, in your own words, now, what happened at that moment that this first set of lights got about 50 feet from you?

A. Well, suddenly this first set of lights swerved across the road, with the back end of the car, the rear end of the car going clear off of the pavement.

The Court: Off of which side?

The Witness: On my side of the road, which would be the east side of the road. They came clear across the road.

The Court: Yes.

The Witness: And then they came back, started back south at an angle, coming in at me on an angle, and I looked over the front of my truck and saw, who afterwards was identified as Mr. Uarte, as the driver of the car, trying very [125] frantically to get his car back on his own side of the road, which he didn't do, and he struck me, approximately we figured, right in the right front wheel or approximately in that position in the truck.

The Court: You were going the opposite direction?

The Witness: Yes.

(Testimony of Don A. McCoy)

The Court: And he hit you in the right front wheel?

The Witness: Yes, sir—Well, approximately. The truck was damaged from the middle of the radiator to the right side and down the right side of the tractor part of it.

The Court: Well, what part of his car hit yours?

The Witness: I couldn't tell exactly. I imagine it was the left front.

The Court: In other words, you were going north and his car skidded over and hit you, off of his side of the road?

The Witness: Yes. Here was my vehicle going this way and he came in at an angle, which would be the south-west.

The Court: Go over to the board. You don't need to take any chalk. And just give me an idea.

The Witness: Here is the truck (indicating on black-board).

Mr. McKnight: Will you take the pencil and point and mark it? [126]

The Witness: All right. Here is the truck (indicating). This car came across the road. It was pointed in this direction, due in front of me.

The Court: Yes, I understand.

The Witness: Possibly this isn't exactly the way it was. And it came right out and struck the right front end of my truck.

The Court: The back end?

The Witness: No, the front end; the front end of his car struck the front end of my truck.

The Court: All right.

(Testimony of Don A. McCoy)

The Witness: And assuming from the damage that was done on the—

Mr. McKnight: Let us not assume anything.

The Court: All right.

Mr. McKnight: All right. Will you take the witness stand.

(Witness returns to witness chair.)

Q. By Mr. McKnight: Now, isn't it a fact, Mr. McCoy, that almost instantly before the Uarte automobile swerved across to the left side of the road, that you at that moment saw the lights of the car behind it again?

A. I don't recall.

Q. Do you remember when the District Attorney of Madera County came out there immediately after the accident and asked [127] you how the accident happened, and you told him?

A. Well, I don't remember exactly word for word.

The Court: Well, do you remember the occasion of telling him?

The Witness: Yes, I do.

The Court: And when you told him that, at that time, that was fresh and immediate in your recollection?

The Witness: Yes, sir.

The Court: And if that statement were shown to you, would it refresh your recollection, now?

The Witness: I believe it would, yes, sir.

The Court: All right. If you have the statement there, have a copy of it, have you?

Mr. McKnight: Yes, and that is one of the statements that we have stipulated as an authentic transcript.

The Court: All right. Just show the whole statement to the witness, if you desire.

(Testimony of Don A. McCoy)

Mr. McKnight: Very well.

The Court: It is that long?

Mr. McKnight: Yes, your Honor, it is a very long statement.

The Court: Well, I will let him read it all the way through.

How long has it been since you have seen it, Mr. Witness?

The Witness: Since October. [128]

The Court: Well, I will hear a short witness and he can read it all the way through and he can refresh his recollection, because apparently some things are not clear in your mind, now.

The Witness: I have a notoriously poor memory, anyway.

The Court: You are driving a truck all the time. All right. We will have a short recess.

Mr. McKnight: Mr. McCoy, will you just step down here?

The Witness: Yes.

(Whereupon a short recess was taken.)

Q. By Mr. McKnight: Have you read this statement that you gave to the District Attorney of Madera County at the scene of the accident immediately after it happened?

A. I read the points that I was not familiar with, yes, sir, but I didn't quite recall.

Q. All right. Does that refresh your memory?

A. Yes, sir.

Q. Do you believe now that immediately before the Uarte car swerved to the left that you did see the lights of another car?

A. Yes, sir.

(Testimony of Don A. McCoy)

Q. And will you state to the Court now what the impression was that you got, what appeared to you to happen there?

A. This was what appeared to me, your Honor, it is an assumption, it is a conclusion that I came to, was that— [129]

Mr. McKnight: Just a minute.

The Court: No.

The Witness: Well, the statement—

Q. By Mr. McKnight: It is your impression from what you saw?

A. Yes, sir, that is right; the impression, that is what I mean, yes, sir.

Q. All right.

A. The impression that I got at that time was that the car either skidded or was clipped.

The Court: Or was clipped?

The Witness: Yes, sir.

Mr. Deutz: I object and ask that that be stricken on the grounds it is a conclusion of the witness, his opinion.

Mr. McKnight: It is a matter of description. It is pretty hard for a witness, in the English language, who saw two lights—

The Court: Yes; he saw two pairs of lights.

Mr. McKnight: Two pairs of lights.

The Witness: Two pairs of lights, yes.

Mr. McKnight (continuing): —to describe what he found, without speaking in impressions, and I think that that is permissible.

The Court: Now, do you recall how you saw the two pairs of lights—In other words, if I understand, up to [130] this moment you hadn't seen but one pair of

(Testimony of Don A. McCoy)

lights approaching, and then the pair of lights back of them, and then the pair, rear pair of lights obscured by the first car, and then immediately before the skidding of the car attached to the first pair of lights, you saw the pair of lights from the car behind?

The Witness: That was as near as I can recollect, your Honor.

The Court: And do you recall whether or not they were at the side or what?

The Witness: No—Well, I don't know.

The Court: I mean, how close were they behind the car?

The Witness: They were very close.

The Court: Very close.

Q. By Mr. McKnight: Did they not seem to you at that time, as you have said—

Mr. Deutz: May I have a ruling, your Honor?

The Court: Well, I am trying to get this, before I rule on your motion.

Mr. Deutz: That is why I was objecting to any further questioning by counsel.

The Court: No. I think it is permissible. In other words, before I rule on your motion to strike his answer that it was clipped, I want to get—let counsel ask his question.

Q. By Mr. McKnight: Haven't you stated before, didn't [131] you state in your deposition in the Madera State Court case that at that time the two lights seemed as one, they were so close that they seemed as one?

A. Yes.

The Court: That is, the two pairs of lights.

(Testimony of Don A. McCoy)

Q. By Mr. McKnight: The two pairs of lights were so close at that moment that they seemed as one, is that right? A. Yes.

Q. And did you not tell the District Attorney there the night of the accident, these words: "I don't know. They just seemed to bunch and jump. It was pretty fast." Do you remember that? A. Yes.

The Court: That is, when they bunched, you mean you saw four lights, or couldn't you tell whether they were beside each other?

The Witness: There were more than two.

The Court: There were more than two lights that you could see along in your range of vision?

The Witness: That is right.

The Court: But not behind one another?

The Witness: I don't recall just exactly.

The Court: Well, is that what you meant by your statement, in other words, you saw two lights, and did you see the other two lights behind them, or is it your present [132] recollection, your best recollection, that you saw more than two lights?

The Witness: More than two lights.

The Court: More than two lights facing you?

The Witness: Yes.

The Court: But not one behind the other?

The Witness: Well, they could have been just a little bit off, you know, one way or the other.

The Court: But it was enough so that you could see them?

The Witness: Yes, sir.

(Testimony of Don A. McCoy)

Q. By Mr. McKnight: And there was sufficient so it appeared to you that one of them had clipped the other one?

A. Well, something happened. I don't know what happened.

Q. Well, to refresh your memory, I will ask you if these questions were asked you and these answers were made by you to the District Attorney on the night of the accident, for the purpose of again refreshing your memory:

"Q. Do you have the impression that these cars coming towards you were abreast at the time you approached them?

"A. Well, I would really rather not say. I couldn't hardly make a statement, but they were awfully close together. They were just like one. [133]

"Q. You aren't able to say whether they were abreast, or whether one was passing the other?

"A. No.

"Q. Can you say this: both appeared to be in the southbound lane together, coming toward you?

"A. It appears to me that one clipped the other and threw him there, or one blew a tire, or something.

"Q. As this car swerved toward you, the Ford Sedan that hit you first, did it turn suddenly toward you, or gradually turn toward you?

"A. It pulled right into me. It just seemed to fairly jump out there. That is the reason that I thought he got clipped or blew a tire. It seemed like he was on one side and right now he was over there."

(Testimony of Don A. McCoy)

Do you remember those statements?

A. Yes, sir.

The Court: Are those true?

The Witness: To the best of my knowledge, yes, sir.

Mr. McKnight: We will submit the matter, your Honor.

The Court: Motion to strike is denied.

Q. By Mr. Knight: Now, when this leading vehicle swerved to the left, as you say, and I want to ask you this directly now (it is in this other statement), did it swerve gradually or how would you describe it?

A. Well, as I described it in the deposition, he just [134] zooped over there.

Q. Do you know what we mean by a right angle? A right angle would be straight across the roadway like this (indicating)? A. Yes.

Q. Would you say that he did or did not go across the roadway at approximately a right angle?

A. Well, it is pretty hard—that time element there was so fast.

The Court: And you were moving?

The Witness: Yes.

The Court: And about how fast were you going?

The Witness: About 40 miles an hour.

The Court: About 40 miles an hour.

Q. By Mr. McKnight: Well, again to refresh your memory—

Counsel, you have seen this?

Mr. Deutz: That is right.

Q. By Mr. McKnight: I will show you—

The Court: Mark it for identification, 14.

The Clerk: Plaintiff's Exhibit 14 for identification.

(Testimony of Don A. McCoy)

(The drawing referred to was marked Plaintiff's Exhibit No. 14 for identification.)

The Court: To the best of your recollection, was the leading car clipped from the rear or from the front? [135]

The Witness: Well, I wouldn't say—from the rear.

The Court: From the rear?

The Witness: The leading car was clipped.

The Court: Clipped from the rear.

The Witness: If it was clipped, it would be—

The Court: Well, that is your recollection?

The Witness: Yes. It was either clipped or he blew a tire, your Honor, something that caused him to go across there.

The Court: Well, your recollection is that, under that statement you made, as I understood, you said that was a true statement that you gave him at that time, that he was clipped?

The Witness: No.

Mr. Deutz: No. I would like to correct it in the record, the statement. I believe he stated he was clipped, blew a tire, or skidded, or something.

The Court: All right.

Mr. McKnight: He said the cars just seemed to bunch and come like one, was that statement of his there.

Q. Now, I show you, Mr. McCoy, a photostatic copy of a blackboard map which purports to be a true representation of the blackboard map which was used in the former trial in Madera County. You remember that, do you not? A. Yes.

Q. Do you recognize that diagram now? [136]

A. Yes.

(Testimony of Don A. McCoy)

Q. Now, I show you on this photostat a line marked M-3, which goes almost at a right angle across the highway and then in a southwesterly direction down toward a rectangle which is marked M-1. Was that the course of the vehicle as you drew it at the time of the other trial?

A. Approximately, yes, sir; to the best of my recollection, it was.

Q. And is that still your best recollection of the course that the Uarte car took when it went to the wrong side of the road?

A. Yes, sir.

Mr. McKnight: We ask that that be introduced in evidence as Plaintiff's Exhibit No. 14, your Honor.

The Court: Admitted.

The Clerk: 14 in evidence.

(The drawing heretofore marked Plaintiff's Exhibit No. 14 for identification was received in evidence.)

Mr. McKnight: Your Honor, the line M-1 goes right across here (indicating).

The Court: I see.

Mr. Deutz: Your Honor, I would like admission of that document limited to the extent that it is testified to in this particular case.

The Court: Limited to the examination made of this [137] witness; that is to say, the M-1 line.

Mr. McKnight: Yes, your Honor. That is the only purpose I have.

Mr. Deutz: I believe it was M-3, was it not?

The Court: M-1.

Mr. McKnight. Is it M-1 or 3?

The Court: Well, it is M-1 and M-3, I suppose. I don't know. Ask the witness.

(Testimony of Don A. McCoy)

Q. By Mr. McKnight: The line is M-3 and your truck as placed on it at that time is M-1, isn't that right?

A. Yes.

Mr. McKnight: The answer is "Yes," your Honor.

The Witness: Yes.

Mr. McKnight: And it is understood that the only purpose is to establish that particular testimony.

The Court: Wait a minute. Now, the line is M-3 and M-1 is his truck?

Mr. McKnight: Yes, and the line as he drew it, if your Honor please, purports to run from the point where it starts clear down to his truck there.

The Court: Well, that is the line his truck took?

Mr. McKnight: No. That is the line that the Uarte car took, your Honor.

The Court: Oh, I see.

Q. By Mr. McKnight: In other words, if I may ask the [138] leading question. It is your memory that the Uarte car went across the highway like that (indicating on blackboard)?

A. Yes.

Q. And then down into your truck?

A. Yes, sir.

The Court: And then beyond your truck?

Mr. McKnight: And beyond the truck, in the end.

The Court (continuing): When it finally stopped?

The Witness: Yes, sir.

Mr. McKnight: When it finally stopped.

The Court: Yes.

Mr. McKnight: All right.

The Court: You proceeded—Well, I was going to say northerly?

The Witness: I don't know, your Honor.

(Testimony of Don A. McCoy)

The Court: Did you get knocked out, too?

The Witness: No, but my lights were out until when we stopped. When we stopped, we were on the wrong side of the road.

The Court: You started skidding?

The Witness: Immediately after the first car hit us.

The Court: Immediately after the first car hit you?

The Witness: No.

The Court: You don't know? [139]

The Witness: No.

The Court: You knew whether or not you were skidding?

The Witness: No.

The Court: Can you tell from your seat whether you were skidding or not?

The Witness: No, not—I think I was sitting up on top of the cab pretty near. I don't know what was going on after the two impacts.

The Court: After the two impacts?

The Witness: Yes.

The Court: How soon after the first impact did the second one occur?

The Witness: Practically immediately.

The Court: Instantly?

The Witness: Within the same second, I think they determined.

The Court: Well, can you show by clapping your hands together and indicate the interval between the claps as to how soon that happened, like giving the first one and then wait until the second one?

The Witness: Let's see, it is pretty hard to do, to be exact, but the first one (witness claps hands) was

(Testimony of Don A. McCoy)

like that, and then it just seemed like there was another one (witness claps hands), practically immediately afterwards.

The Court: Well, do that again, will you? [140]

(The witness claps his hands twice, with an interval of time between each clap.)

The Court: Wait a minute. Now, I did not start my stop watch. All right, do it again.

(The witness again claps his hands twice, with an interval of time between each clap.)

The Court: That is about—

Mr. McKnight: Approximately a second, I would say.

The Court: Approximately a second.

The Witness: They were awfully close together, your Honor.

The Court: To you, they seemed—

The Witness: Very close.

The Court: —almost immediately?

The Witness: Almost. You know what I mean.

The Court: Instantaneously?

The Witness: Yes.

The Court: Did you know where the other car hit your car, what happened then, or how it hit?

The Witness: Well, it hit on the front, and I knew that because I did get a glimpse, I believe, of it—

The Court: Of the station wagon?

The Witness: —of the headlights, but I did not know what it was, naturally, but I did get a glimpse of the headlights. [141]

The Court: Yes.

(Testimony of Don A. McCoy)

The Witness: In what position or where I was at the time, I do not know.

The Court: All right.

Q. By Mr. McKnight: As I understand it, Mr. McCoy, you were never at any time in a position where you could estimate the speed of either of these other vehicles? A. No, no, I could not say.

Q. And the Uarte car, as you testified, struck your tractor or truck in the proximity of the right front wheel?

A. Yes.

Q. And immediately upon that impact taking place, what happened as far as you can remember in reference to your truck? A. Well, my lights went out.

Q. And what happened to the steering wheel, do you remember?

A. And the steering wheel started spinning.

Q. The steering wheel started spinning, and then there was another impact immediately? A. Yes.

Q. Would you say, to the best of your ability, which was the most severe of those impacts, the first or the second one?

A. I would say the second one was. [142]

Q. The second one was the most severe?

A. Yes, sir, that is to the best of my knowledge.

Q. To the best of your knowledge, the best impression you have of it? A. Yes.

Q. Then, your vehicle came to a stop in approximately the position that the officer has—Well, you haven't seen that?

A. No, sir, I have not.

Mr. McKnight: By the way, your Honor, may I at this time substitute photostatic copies for Plaintiff's Exhibit No. 13 and return the original to the traffic officer?

(Testimony of Don A. McCoy)

The Court: Well,—

Mr. Deutz: That is all right, your Honor. I have examined them.

The Court: Well, this is yours—

Mr. Deutz: Oh,—

The Court: Did you get any white ones?

Mr. McKnight, he said, your Honor, he could not get the white ones in the time he had designated to do it.

The Court: All right.

Mr. McKnight: Shall I have these marked?

The Court: Yes; 13.

Mr. McKnight: May I return the originals to the officer? [143]

The Court: Yes. The record will show that they are returned to the officer who testified this morning, Mr. Deming.

Mr. McKnight: Deming.

The Court: Deming. All right, now, have you an extra one of those, so I can be looking at it while you are showing it to the witness?

(Mr. McKnight hands copy of said exhibit to the Court.)

The Court: This is the same?

Mr. McKnight: Yes, sir.

Q. Now, I show you Plaintiff's Exhibit No. 13, Mr. McCoy, and point out a trailer, semi and tractor as they were drawn upon that exhibit by the traffic officer, and ask you if that is your recollection of the location of your equipment after the accident had occurred and after you were able to examine it?

(Testimony of Don A. McCoy)

A. Yes. I was in doubt of those at the other trial and I looked at the pictures to determine that my tractor and semi was off the highway a little bit.

Q. And at that time when off the highway, it was off of the left side of the highway?

A. Yes, headed south.

Q. Indicating that the vehicle during the accident at some time had passed from the right-hand lane over across the left-hand lane and off on the shoulder? [144]

A. That is right, yes, sir.

Q. Now, were you in court this morning when the officer testified? A. Yes.

Q. And you heard him testify as to some gouge marks which were in the easterly lane of traffic, that is, the east lane of traffic that you were driving in before the accident? A. Yes.

Q. Did you see those gouge marks? A. Yes.

Q. Will you state to the Court, to the best of your ability, where, in relation to those gouge marks, the front end of your truck was at the time of the first impact with the Uarte car?

A. I have no idea of knowing—no way of knowing.

Q. You have no way of knowing? A. No, sir.

Q. Well, you saw the gouge marks there the night of the accident, didn't you, Mr. McCoy?

A. Yes, I saw them there and I might—maybe in my deposition I might have been—

Q. Let me refresh your memory again, if I may. I have the exhibit, which is the blackboard map.

A. But now I don't recall. [145]

(Testimony of Don A. McCoy)

Q. I show you Plaintiff's Exhibit 14, which was the blackboard map made at the trial in Madera County, and call your attention to the fact that you place your truck right approximately at the point of those—

A. Gouge marks.

Q. —gouge marks; was that your recollection at that time?

The Court: That was the front of your truck?

The Witness: Yes, I guess it was at that time.

Q. By Mr. McKnight: And do you remember whether or not you did not so testify, that it was at the approximate position, or do you remember?

The Court: He just said it was.

Mr. McKnight: Yes.

The Court: It doesn't make any difference what his testimony was. He said it was.

Q. By Mr. McKnight: That is your recollection as best you can place it? A. Approximately.

Q. That the first impact took place at approximately in the vicinity of those gouge marks?

A. Oh, yes; yes. I didn't follow your question at the beginning.

Q. You didn't understand my question a few moments ago? [146]

A. No. I thought you were trying to determine whether I knew actually for a fact that was the position I was in.

Mr. McKnight: Your recollection.

The Court: Your recollection is that that was approximately the location?

The Witness: Yes, approximately.

(Testimony of Don A. McCoy)

Mr. McKnight: All right.

Q. Before the Uarte car went across the highway onto your side, as you have described, was it driving on its own right-hand side of the white line?

A. Yes, sir.

Q. Was it swerving or swaying or zig-zagging, to your knowledge?

A. No, sir.

Q. That was the first deviation from a straight course when it suddenly appeared to jump across the highway?

A. Yes, sir.

The Court: Where was the second body found, of the sailor?

The Witness: In the station wagon, your Honor.

The Court: He was in the station wagon?

The Witness: That is what they say.

The Court: Does the officer remember? I mean, can you produce that testimony? [147]

Mr. McKnight: Yes, sir; if the officers are still here, I can ask them, your Honor.

The Court: Do you know, did you notice?

The Witness: I never looked at the station wagon. I was told—See, he didn't die until the next morning.

Mr. McKnight: I will put the officer on for that purpose, your Honor.

The Court: All right.

Mr. Deutz: Might he locate the positions P-1, 2 and 3 on that map?

Mr. McKnight: I don't know.

Q. And as I understood you to say,—Let me withdraw that.

(Testimony of Don A. McCoy)

When the Uarte car went across the highway in front of you, as you have described it, did it go directly into your headlights at that time?

A. To a little easterly.

Q. It went across your headlights?

A. Across my headlights.

Q. And as it went across your headlights, could you see the driver of that vehicle?

A. Not until he started toward me.

Q. Oh, I see, and as you saw him, you say he was trying frantically to get his car back?

A. Yes, sir. [148]

Q. Can you describe what he was doing?

A. He was sitting up in the car. He was very alert and he was trying to pull the steering wheel back. He was sitting up high in the car and had a good grip on the steering wheel trying to pull it back.

Q. To its right?

A. Yes, sir, just immediately before the impact.

Q. You described where the Uarte car struck your vehicle in the proximity of the front, the right front wheel. Where was it—on what part of your vehicle was the impact of the other vehicle, or the second impact, we will put it that way?

A. Approximately in the same part of the truck.

Q. Approximately in the same position. In other words, the two collisions were, as far as you could tell, in the same spot on your tractor?

A. Approximately from the middle of the radiator over to the right-hand side.

(Testimony of Don A. McCoy)

The Court: Where it was damaged?

The Witness: Yes, sir. That is where it was damaged.

Mr. McKnight: I think that is all, your Honor.

The Court: Cross examine.

Cross-Examination.

By Mr. Deutz:

Q. Mr. McCoy, I believe you testified that you first [149] noticed these cars—

Mr. McKnight: Would you excuse me just a moment, your Honor? At the end of our testimony we are going to need a doctor from Madera, and he was one witness who I thought we could call at any time without inconveniencing people who are from out of town. And therefore, I haven't asked him to come. I hate to ask these doctors to stay away from people who need them all day long. Could it be understood that if we do finish before this evening, counsel could start his case, so I could call that witness sometime toward the end of the trial?

The Court: How many more witnesses have you?

Mr. McKnight: I have the two men who were in our vehicle, your Honor, which should be very short.

The Court: And Mrs. McCoy?

Mr. McKnight: No, I don't intend to call her. Maybe the District Attorney will.

The Court: Yes. Well, they are your witnesses.

Mr. McKnight: And I think that that is all I will have.

The Court: Well, how long does it take the doctor to get here from Madera?

Mr. McKnight: Well, if he isn't engaged at something that he can't just leave immediately, he can get here

(Testimony of Don A. McCoy)

in about three-quarters of an hour. The reason I mention it [150] now, if it is necessary to call him tonight, I would like to have the opportunity.

Mr. Deutz: I have no objection to calling this man after they have concluded. If you want to call him later in the case, that is all right as far as we are concerned. We have witnesses here. I have four men from San Francisco. Mrs. McCoy is here from Oakland, and I have two witnesses present in court from Madera. If this matter is going to be recessed by any chance for a day or two, I think they should have a chance to testify.

The Court: I don't know. I haven't anything to do tonight.

Mr. McKnight: I would be very pleased to try to complete it, because it is very difficult for my client, who is a working man, to stay away for two or three days.

The Court: If you want to have the doctor here, say, for an evening session, I suppose you would be able to get him at maybe about 5:00 o'clock and have him here about 7:00 o'clock.

Mr. McKnight: I think I could, unless there is some emergency that would keep him from coming. With physicians we sometimes have to consider those things, but that at least would permit us to get other witnesses on, who are away from home, from a distance, and I would be perfectly willing to do it. [151]

The Court: Well, we will finish with this witness and your other two witnesses and then I take it that it is stipulated by the government that the plaintiff's case will not be closed without the doctor's testimony, but that you may call him, and the government go forward.

(Testimony of Don A. McCoy)

Mr. Deutz: I will stipulate that it will not be closed, but I believe the doctor's testimony will go strictly to the measure of damages, and if there are any appropriate motions as to the plaintiff's case, I can make the motions.

The Court: Let me suggest, for the purposes of the record, the stipulation be that the plaintiff does not rest but that you call your witnesses out of order who are here.

Mr. Deutz: Well, your Honor, I would like it this way: If we call our witnesses out of order, it might prejudice my motion which I might make at the close of the plaintiff's case.

Now, the doctor they wish to call is important only on the measure of damages, and our motion will be directed to strictly whether or not negligence has been established.

I would like to say the case is closed for that purpose, excepting as to further testimony on the question of the measure of damages.

The Court: Well, let us get on. We can get the doctor here. [152]

Q. By Mr. Deutz: Mr. McCoy, when you first saw these cars coming down the highway toward you, I believe they were approximately 750 feet away from you, is that correct? A. Yes.

Q. At that time, you noticed two separate sets of headlights? A. First one and then the other.

Q. It appeared to you that those two sets of headlights came a little closer to you. A. Yes.

Q. And at one time the second lights appeared to be obscured by the first, is that right? A. Yes.

Q. Or at least one or the other was obscured?

A. That is right.

(Testimony of Don A. McCoy)

Q. At any time prior to the swerving of the plaintiff's vehicle into your path, did you notice either car out of their own particular lane of traffic; in other words, they were headed southbound, at any time did you ever see them swing into the northbound lane? A. No, sir.

Q. Did you ever see one car or the other abreast of each other? A. Well,—

Q. Or were they single file? [153]

A. To the best of my knowledge, they were.

Q. They were what? A. Single file.

Q. They were single file.

The Court: When you say to the best of your knowledge, do you mean to the best of your recollection?

The Witness: To the best of my recollection.

Q. By Mr. Deutz: At any time do you ever recall the two cars being abreast of each other?

Mr. McKnight: Now, by "abreast," counsel, do you mean—

Mr. Deutz: I mean either side by side or at least you could see the four headlights lined up against you? That would be the best indicia at nighttime.

Mr. McKnight: By "abreast," you mean normally with the two headlights even?

Mr. Deutz: No. That is not what I mean.

Q. I mean, at any time did you notice one car and the other car apparently side by side or at least those four lights appeared to be in a row?

A. Well, I saw all four lights at one time.

The Court: Just before the accident?

The Witness: Just before the accident.

Q. By Mr. Deutz: Yes, but were those four alongside of one another, or did you see one and then the other?

(Testimony of Don A. McCoy)

A. From a distance they could appear to have been [154] alongside of each other, when in reality they could have been 25 feet behind each other.

Q. But immediately prior to the accident itself, did you see four headlights at any time, immediately prior to the accident; I mean, within, say, 100 or 150 feet?

A. Well, that is approximately—No, it wasn't that far, that they came together.

Q. You saw the two came close together?

A. Yes.

Q. At any time did you see an impact between those two vehicles? A. No, sir.

Q. An actual vehicle impact? A. No.

Q. At any time did you hear the sound of an impact between those two vehicles? A. No, sir.

The Court: Well, could you have with your motor?

The Witness: No, sir.

Q. By Mr. Deutz: Your vehicle makes too much noise? A. Yes, sir.

The Court: Was it a Diesel?

The Witness: No; a 324-horsepower Heil-Scott, bearing butane.

The Court: I think I can take judicial notice that [155] they make noise.

Mr. Deutz: I think you can, your Honor.

Q. At no time did you see the vehicles come into actual contact with one another? A. No, sir.

Q. And you saw the two cars come fairly close together. Did you see anything to indicate that the first car might have decelerated or put on its brakes and so brought the two cars together? A. No.

(Testimony of Don A. McCoy)

Q. Likewise, you cannot say definitely the speed that one was overtaking the other or that they were being overtaken? A. No.

Q. The plaintiff's car, you say, swerved toward you when about 50 feet away from you it started to swerve toward you, is that correct?

A. Yes, sir; it swerved fast across the road.

Q. It swerved fast?

Mr. McKnight: Just a moment. Did the reporter get the rest of that answer, "fast across the road"?

The Witness: Across the road.

Q. By Mr. Deutz: Calling your attention to Plaintiff's Exhibit No. 14, you pointed out a position on this diagram which is marked M-1. Was that the position of your vehicle [156] at the time of the impact, or was Point M-2 the position of your vehicle at the time of the impact?

A. No. You have this a little confused, counsel. This (indicating) is the position, approximate position of the Uarte car when it immediately went across the road.

Q. When it immediately went across the road?

Mr. McKnight: Wait a minute. Let us get that for the record. He is now pointing to M-2 on Plaintiff's Exhibit No. what?

Mr. Deutz: 14.

The Court: 14. He is pointing to M-2. I thought that was M-1.

The Witness: Here is M-1 here (indicating).

The Court: Oh, M-1.

The Witness: Yes.

(Testimony of Don A. McCoy)

The Court: M-2, that is the Uarte car after it got across the road and finished skidding?

The Witness: That is right, sir.

The Court: And M-3 is when it started from the line?

The Witness: Yes, sir.

Q. By Mr. Deutz: Now, position M-3, then, is where the vehicle first started to swerve, Mr. Uarte's vehicle first started to swerve; M-2 is the position that the vehicle reached, its farthest eastward position toward the dirt edge of the road, and then apparently Mr. Uarte's vehicle [157] started on a diagonal line back across your lane of traffic heading southwest from the edge of the pavement toward the center of the line, and the point of impact was approximately M-1; is that correct?

A. Yes.

Q. And that is also the place where there are some gouge marks which are marked on this particular diagram as position D-1; is that correct?

A. I don't know what they are—D-1, yes, it is gouge marks there.

Q. The gouge marks were approximately at the point of impact? A. Yes.

Q. Very well. Now, you stated, I believe, that there were two impacts involving your vehicle, is that correct?

A. Yes.

Q. Weren't there, in fact, three impacts?

A. There was a slight impact.

Q. Now, wasn't it a fact that you had two impacts very close together and then a break and then a third impact?

A. Yes; there was three impacts.

(Testimony of Don A. McCoy)

Q. There were actually three impacts. Now, I would like to ask you this: What is the color of this Golden State vehicle?

A. It was cream and with a red stripe, with white in [158] the center.

Q. All right: I want to ask you whether you found any signs on the semi-trailer, the semi of your vehicle, of any indications of an impact, any scratching or damaged portion on the semi?

A. Yes, we did.

Q. That was at what position on the semi?

A. That was on the right side of the semi; I believe it was very close to the rear end of the semi.

Q. Now, that is a distance of approximately 25 or 30 feet from the very front extremity of the vehicle, is it not?

A. It is further than that. It is—I think that is a 24-foot box.

Q. A 24-foot box.

A. So it would be about—

Q. About a 12-foot tractor, isn't it?

A. And from the point where the piece sets on the tractor forward I think would be more, about 9 feet, I would say.

Q. About 9 feet. 9 and 24 would be approximately 33 feet.

A. Approximately.

Q. Approximately 33 feet from the front bumper of your truck to the second point of impact on the semi?

A. That is approximately. I think the trailer is an [159] 18-foot trailer and a 4-foot tongue. That would be a 22. It is approximately that, yes.

Q. And there was damage to the semi there, where some object—

A. Yes.

Q. —had damaged, scraped along there along that side?

A. Yes.

(Testimony of Don A. McCoy)

Q. Did you have occasion to observe, examine Mr. Uarte's vehicle after the accident? A. Yes.

Q. Did you notice any paint marks on that vehicle, I mean color foreign to the natural color of that car?

A. Yes.

Q. On what part of the body of Mr. Uarte's vehicle were they located?

A. As near as I can recollect, it was on the left rear corner.

Q. The left rear corner of Mr. Uarte's vehicle had paint marks on it, is that right?

A. I believe so.

Q. And what color were those paint marks?

A. They were cream.

Q. They were cream. Was that the same cream color as you have on your semi? [160]

A. It was the same color. Whether it was the same paint or not, I don't know.

Q. It was the same color? A. Yes.

Q. Mr. McCoy, the officer testified that on the morning following the accident they found some gouge marks on the highway.

Do you have your Exhibit 14?

The Court: 14?

Mr. Deutz: I don't know. It must be 13.

The Court: 13. Well, you have another copy there, you yourself.

Mr. Deutz: I don't have one. This is 14.

The Court: This is just an extra copy of 13.

Mr. Deutz: That is my 14 and I don't have a copy of 13.

(Testimony of Don A. McCoy)

The Court: These are not marked. You have two that are not marked.

The Clerk: Yes, that is right.

The Court: He wants to see them.

Q. By Mr. Deutz: I show you a second sheet of Exhibit No. 13, where it was testified that there were gouge marks on the most westerly lane of the highway, that is, on the southbound lane, and I would like to ask you whether at any time your vehicle was in that position? Did your [161] vehicle ever pass into the right—the southbound lane at this point? We have here some skid marks at a point farther north, approximately 70 feet, 65 to 70 feet north, which on the first page of Exhibit 13 would appear to be in the location of the trailer and the tractor, your tractor, trailer and semi at the time it came to rest. Now, due south of there about 60, 65 feet there are some gouge marks in the pavement. I would like to ask you, whether to the best of your knowledge, you know whether your rig was ever in that position on the highway?

A. That was below where I ended up at?

Q. Yes, below where you ended up? A. No, sir.

Q. Did you make a very sharp turn to the left when you lost control of your rig, or did you make a fairly easy turn?

A. No. We made—to have covered the—

The Court: No. Just what you remember now.

The Witness: Yes.

The Court: I asked you on direct, if I remember it, and you said you did not remember.

The Witness: Well, then, I don't know.

The Court: Then, you don't know what happened?

(Testimony of Don A. McCoy)

The Witness: I don't know, then.

The Court: Well, is that a fact? I mean, do you [162] remember, or are you just trying to deduct, now, that you did or didn't?

The Witness: Well, the wheels started spinning.

The Court: And then what happened after that?

The Witness: I took off up in the air, then.

The Court: You don't know?

The Witness: No.

The Court: You had been bounced, had you?

The Witness: Bounced twice.

The Court: You had been bounced twice from your seat?

The Witness: That is right.

The Court: So, not only did the wheels start to spin, but you did not have any control of yourself?

The Witness: That is right, yes, sir.

The Court: All right. I suppose at that moment you were thinking about yourself rather than—

The Witness: I was thinking about the "boss."

Mr. Deutz: We will stipulate that Mrs. McCoy was riding with him.

Q. Now, at the time that Mr. Uarte passed in front of you with the car, I believe you stated that you could see him struggling with the wheel of his car?

A. That was after he tried to straighten up.

Q. After he tried to straighten out? Didn't his lights blind you at all? [163]

A. No, sir. No. We sit pretty high.

Q. You sit pretty high? A. Yes.

Q. You are able to look down over the lights.

(Testimony of Don A. McCoy)

You stated that there were three impacts. Would you be able to space as to time the lapse of time between the three impacts? You stated, first, that there was an impact (Mr. Deutz illustrates by clapping his hands once), and another impact (Mr. Deutz illustrates by clapping his hands once), which was timed at approximately one second, and then you have stated that there was a third impact.

Now, which one of those three impacts was the most violent? A. The second one.

Q. The second one was the most violent. The third one, the third impact was violent also?

A. No. It was just a bump.

Q. It was just a bump. About what was the lapse of time between the second and third impacts?

A. I do not recall.

Q. Was it as short a time as between the first and the second, or was there a longer space between the second and third than between the first and second?

A. I would hate to say, because I don't just—it possibly was a little bit longer. [164]

Q. Now, in your statement to Mr. Chandler on the night of the accident—

The Court: Mr. Chandler is the Assistant District Attorney?

Mr. Deutz: Mr. Walter Chandler was the Assistant District Attorney from Madera County, at that time.

The Court: And that is the statement referred to on direct?

Mr. Deutz: And that is the same statement previously referred to. I don't believe it was introduced in evidence, was it?

(Testimony of Don A. McCoy)

Q. You made the statement, Mr. McCoy, at that time you said as follows:

“It appears to me that one clipped the other and threw him there, or one blew a tire, or something.”

And at the same time you had previously stated that you could not definitely say whether the cars were ever abreast, and you have stated here that you cannot say positively that the cars ever came in contact.

Now, Mr. McCoy, was that statement that you made at the time a statement based upon actual notice of particular events that took place, or was it merely a conclusion of what might have been a possible reason for this particular car swerving across the highway in front of you?

A. It was to—It was a conclusion. [165]

Q. It was a conclusion, merely as a means of seeking explanation for what might have taken place?

A. Yes, sir, because I did not see them collide or touch each other.

Q. You did not see them touch each other?

A. That is right.

The Court: Have you seen other cars clipped?

The Witness: Yes; yes, I have, lots of times.

The Court: Have you seen other cars blow tires?

The Witness: Yes, sir.

The Court: Do they always act the same?

The Witness: Sometimes they act the same, yes, they do.

The Court: Generally?

The Witness: Generally.

The Court: This car acted like it was either clipped or blew a tire?

(Testimony of Don A. McCoy)

The Witness: Yes, sir.

Q. By Mr. Deutz: I would like to ask you a question: Mr. McCoy, from your experience,—How long have you driven trucks or automobiles?

A. 20 years.

Q. For 20 years, and you have driven them in all types of weather? A. Yes, sir. [166]

Q. Have you had occasions where you have had flat tires rather than blowouts on a highway in rainy weather?

A. Yes.

Q. I would like to ask you this hypothetical question: In your experience in driving vehicles over a considerable period of time, if you were driving along a wet, slippery road, and you had a flat tire, not a blowout but just a flat tire, and you suddenly put on your brakes, what would be the effect?

Mr. McKnight: Just a moment. To which we object on the grounds that the hypothetical question, if your Honor please, is not based upon any evidence in the case; therefore, it is improper and calls for a conclusion and opinion of the witness on a question that is not the subject of expert testimony, also. There is no testimony in the record of anything from which it can be inferred that that set of facts took place.

The Court: Well, he has testified that it was either clipped or had a flat tire. The objection is overruled.

Q. By Mr. Deutz: What would be the effect of suddenly putting on your brakes under those conditions?

The Court: In your opinion.

A. Well, it would swerve you, not depending entirely upon which tire it was, whether it was front or back

(Testimony of Don A. McCoy)

or on which side, which would determine, have some factor in [167] determining which way you would go, but it would definitely throw you into a slide or a skid in one position or the other.

The Court: Or a swerve?

The Witness: Or a swerve, yes, sir.

Q. By Mr. Deutz: Now, under the conditions of the road on that particular night, would you say if a person had a flat tire and suddenly put on the brakes, they would skid, swerve, or possibly lose control of their car?

A. They would, yes, sir.

Mr. McKnight: We object on the same grounds, to each of the hypothetical questions.

The Court: The objection is overruled.

Did you take any notice of the speed of the cars that were traveling toward you?

The Witness: No, sir, I couldn't estimate how fast.

The Court: You have seen cars on flat tires, haven't you, as they travel along the road?

The Witness: Yes.

The Court: How fast do they travel when they keep on moving?

The Witness: About 15 miles an hour.

The Court: With a flat tire?

The Witness: If they keep on going, they would.

The Court: If they keep on going. But, if a fellow [168] had a flat tire and he deliberately kept on going, about how fast does he ordinarily travel?

The Witness: He wouldn't travel very fast.

The Court: About 4 or 5 miles an hour?

(Testimony of Don A. McCoy)

The Witness: Because he could not hold the car on the road.

The Court: That is a front wheel or a rear wheel?

The Witness: A rear wheel.

The Court: Did you observe as to whether or not either one of these cars were traveling as if they had a flat tire when you saw them coming over the ridge?

The Witness: No, sir.

Q. By Mr. Deutz: Mr. McCoy, my hypothetical question was directed to the possibility of a sudden flat tire rather than the driving on a flat tire, and my question was that if a tire would suddenly happen to become flat and you put on your brakes on this slippery road, whether you would lose control of the car? Now, would your answer be the same as you have previously given?

Mr. McKnight: Same objection.

The Court: Objection overruled.

Mr. Deutz: Go ahead.

A. I will say this, counsel: It is my belief that if a left front tire went flat, that suddenly went flat without a blowout, but if it was soft and had gone flat and if the [169] man jammed his brakes on, due to the fact that that tire is flat, you have more braking power on that wheel and it would pull you to the left. The same thing would happen to the right, if he had a right front tire that went flat. That has been my experience.

Q. By Mr. Deutz: So, also, if you had put on your brakes and the right front tire should be flat and it should cause you to spin to the right on a slippery road, could it very easily slide sidewise on the highway?

A. It could.

(Testimony of Don A. McCoy)

Q. I believe you also testified that at the time Mr. Uarte's car was swerving, the rear end of that car was the first portion of that car to reach the outer edge of the road on your side of the highway?

A. Yes, sir.

Q. In other words, the back end was swinging around, is that correct?

A. Yes, sir.

Q. Did you have occasion to examine Mr. Uarte's car at the scene of the accident?

A. Yes.

Q. Did you notice whether there were any flat tires on that car?

A. Yes. There were two.

Q. What tires were flat? [170]

A. I don't recall which ones now, but there were two. It was one front and one rear, as I remember, but which tires, I don't remember, I don't recall now.

The Court: Well, here is a photograph of the front of the car. None of them appear to be flat.

The Witness: This side, your Honor, is flat, the right front tire is flat.

The Court: The right front tire?

Mr. Deutz: The right front tire of that car is flat, your Honor.

The Court: Here is the rear.

Mr. McKnight: Yes, the right front tire is flat.

The Witness: And the left rear tire, and you have the concave in your tire here, where it bends.

Mr. Deutz: All right, fine.

The Court: Well, you have been in a number of wrecks before, have you?

The Witness: No, sir.

The Court: Accidents?

The Witness: No, sir.

(Testimony of Don A. McCoy)

The Court: Or seen them?

The Witness: Yes, sir.

The Court: Have you ever seen tires blow in accidents like this?

The Witness: Yes, sir. [171]

The Court: That is, actual impacts?

The Witness: Not actually seen it, no.

The Court: Well, I mean you have seen the result of it?

The Witness: Yes, sir.

Q. By Mr. Deutz: Now, I will ask you this question: Were those tires actually blown in this instance?

A. That I do not know. They were flat. I don't know whether they were blown or not.

Q. You were traveling north; approximately what speed were you traveling?

A. Approximately 40 miles an hour.

Q. And what is the weight of your vehicle?

A. I believe that night I had approximately around fifty-five or fifty-six thousand pounds gross.

Q. 56,000 pounds gross.

The Court: That is the combined vehicles?

The Witness. Yes, sir.

Q. By Mr. Deutz: Do you know whether there is a speed limit on speeds of vehicles of that kind?

A. Yes, sir.

Q. What is that speed limit?

A. 40 miles an hour.

Q. That is a maximum speed limit, is it; is that correct? [172]

A. Yes, sir.

Q. This was a rainy, slippery night, and you were traveling at maximum speed at that time?

A. Approximately, yes, sir.

(Testimony of Don A. McCoy)

Q. In your experience of driving a unit of approximately 55,000 pounds in a rainy, slippery weather, is it your custom to drive such vehicle at the maximum speeds?

Mr. McKnight: To which we object on the grounds it is incompetent, irrelevant and immaterial, and not within any issues of this case. It may be important in some other case.

The Court: Well, what his conclusion is, I think, is immaterial in any case.

Q. By Mr. Deutz: Did you consider it reasonable and prudent to operate this vehicle at that time at the maximum speed limit, considering the weather conditions at the time?

Mr. McKnight: The same objection.

The Court: Objection overruled.

A. Well, a driver determines a lot of things individually.

The Court: Well, did you consider it reasonable and prudent?

The Witness: I did, yes, sir.

The Court: You considered you were driving carefully?

The Witness: Carefully. [173]

The Court: Consistent with all the conditions in your experience, the conditions of the road?

The Witness: Yes.

The Court: The weather, the traffic?

The Witness: Yes, sir; the traffic was light.

The Court: And all those things taken into consideration, you thought you were driving carefully?

The Witness: Yes, sir. I know I wasn't driving over 40 miles an hour. I set the speed at approximately 40 miles an hour. Because we determine our speed by the gear we drive in.

(Testimony of Don A. McCoy)

The Court: You were driving in the 40-mile-an-hour gear?

The Witness: No. I had just shifted into what we call direct fifth from over fourth, and you go into about 37 or 38 miles an hour.

The Court: How many speeds do you have on that?

The Witness: 18.

The Court: 18?

The Witness: 15 ahead and 3 in reverse.

Q. By Mr. Deutz: This maximum speed limitation they set on vehicles of that size is not set according to any particular weather standards, is it? A. No, sir.

Q. In other words, that is your maximum speed in [174] driving, whether in clear weather, on a dry road, dry surface, or under the most favorable conditions, shall we say?

A. It doesn't stipulate that, your Honor.

Q. But at least that is the maximum speed under any conditions?

A. It has been always my assumption that they have taken everything into consideration when they set the speed limit.

Mr. Deutz: Just a moment. That is all.

Redirect Examination

By Mr. McKnight:

Q. Mr. McCoy, you say that you did not actually see an impact between the two other vehicles. As a matter of fact, when they were 50 feet from you and all of this started, all you could see of either vehicle was their lights, wasn't it? A. Yes, sir.

Q. And you also stated in answer to counsel's question that your statement to the District Attorney and

(Testimony of Don A. McCoy)

here in Court that the rear vehicle appeared to clip the other vehicle was based—was a pure—was a conclusion. That conclusion or impression, or whatever you want to call it, was based on what you saw there, then, that night, wasn't it?

A. It was based on the actions of the Uarte car.

Q. And also on the actions of the other car when you [175] saw the two lights bunched together and then one started skidding, wasn't it? A. Yes, sir.

Mr. McKnight: That is all.

The Court: Here is Exhibit No. 10. This has been testified to be a photograph of your truck outfit that night, and is that the extreme rear end of your trailer?

The Witness: The semi-trailer, the first unit.

The Court: Oh, this was the extreme rear end of the semi-trailer, the first unit?

The Witness: Yes.

The Court: All right. The witness may step down and be excused.

Mr. McKnight: One more question about that, your Honor.

Q. You say that you did examine the Uarte car after the accident happened. Did you see any damage on the left rear fender of that car?

A. Well, as near as I can recollect—

The Court: Well, here is the photograph.

The Witness: Yes.

The Court: That is Exhibit No. 3.

Q. By Mr. McKnight: The damage appearing in that photograph appeared on the car when you saw it at that time, is that right? A. Yes. [176]

(Testimony of Don A. McCoy)

Q. And when that vehicle collided with the front part of your truck, it was headed in from a southwesterly direction, wasn't it? A. Yes.

Q. With its left side away from your vehicle; in other words, the left—

A. Yes.

Q. —when it struck the front of your vehicle, that left rear fender that shows damaged in that picture was clear on the opposite side of the vehicle from you, wasn't it?

A. Yes, sir. Have you the front picture there, Judge?

The Court: The front picture. There is a front picture of the Ford. That is Exhibit 9. Here is the front picture of the station wagon, 5.

The Witness: I never saw that one. I never did look at it, your Honor.

The Court: Oh, you didn't even go to look at the station wagon?

The Witness: No. I was having enough trouble with my insides without looking at any more.

Q. By Mr. McKnight: Now, you say that you saw some paint on the left rear corner in the vicinity of that damage, is that right? [177] A. Yes.

Q. And that appeared to you to be a rather cream color? A. Yes.

Q. Could you tell from looking at it whether it was paint brought onto it from another source or whether it was the undercoating on the vehicle itself?

A. No. I am not an authority on paint, so I did not determine.

(Testimony of Don A. McCoy)

Q. You didn't tell that. You just saw some light-colored— A. Cream-colored paint, yes, sir.

Q. —paint or marks? A. Yes, sir.

Q. In the vicinity where the damage was done?

A. Yes, sir.

Q. You haven't any idea how it got on there?

A. No, sir.

Q. You don't know whether it was undercoating, or what?

The Court: He says he hasn't any idea.

Mr. McKnight: All right.

The Court: So if he hasn't any idea, he doesn't know anything else.

Mr. McKnight: That is all right, your Honor. [178]

Mr. Deutz: Just a moment. Counsel, you have been quoting this section from that statement to the effect that the cars became bunched together. I haven't been able to find that.

Mr. McKnight: It is on the last page, right at the top of page 15.

Mr. Deutz: Page 15.

Mr. McKnight: Beginning at line 2—beginning at line 1, as a matter of fact, on page 15.

Mr. Deutz: May I see that, please?

All right; that is all.

Mr. McKnight: That is all, Mr. McCoy. Thank you.

Mr. Badostain.

PETER BADOSTAIN,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Peter Badostain.

The Clerk: And your address?

The Witness: 3088 Chadwick Drive, Los Angeles.

Direct Examination

By Mr. McKnight:

Q. Were you riding in one of these vehicles when this [179] accident happened?

A. In the Ford sedan.

Q. That is Mr. Uarte's automobile?

A. Yes, sir.

Q. Is Mr. Uarte a relation of yours?

A. A cousin of mine.

The Court: Mr. Deming, I think they wanted to ask you another question before you leave.

Officer Deming: I will be right back, your Honor.

The Court: Oh, all right. I thought you were leaving.

Q. By Mr. McKnight: Who else was in the car?

A. Mr. Layana and Mr. Uarte.

Q. And Mr. Uarte? A. And Mr. Uarte.

Q. Who was driving?

A. Mr. Uarte was driving.

Q. Whose automobile was it? A. Mr. Uarte's.

Q. Where had you, Mr. Layana and Mr. Uarte been?

A. We had been on a vacation, clean up to Elko, Nevada, and were on our way back.

(Testimony of Peter Badostain)

Q. And this was on what day of the vacation, seventh, eighth or ninth?

A. It was around the seventh or eighth day. I forget [180] now. We were on our way back, going home.

Q. Where had you come from that day?

A. If I remember correctly, Antelope, the town of Antelope.

Q. You had started your trip south from Antelope?

A. Yes, that night—that afternoon.

Q. About what time did you start from Antelope?

A. Well, if I remember right, it was about 5:00 o'clock in the afternoon.

The Court: Where is this Antelope?

The Witness: It is 15 or 16 miles north of Sacramento.

Q. By Mr. McKnight: How far from the place where the accident happened?

A. Approximately 165 miles.

Q. And what had you been doing just prior to starting, during that day?

A. Well, we had our dinner and was laying around until it got cooled off a little bit so we could start.

Q. Did any of you take a sleep during the afternoon?

A. We all did.

Q. You all did. You started around about what time?

A. Around about 5:00 o'clock in the afternoon.

Q. Throughout this trip, who had been driving?

A. Well, we took turns.

Q. Who started at Antelope? [181]

A. I started at Antelope and drove down to Merced.

(Testimony of Peter Badostain)

Q. And what did you do at Merced?

A. At Merced we stopped, had a bite to eat, had a tire fixed, and we started out.

The Court: What time was it?

The Witness: I don't remember what that second time was.

Q. By Mr. McKnight: Do you have any memory of the time you were at Merced?

A. I don't remember, to tell you the truth.

Q. You don't remember?

The Court: Was it dark?

The Witness: Oh, it was at night.

Q. By Mr. McKnight: And had any of you, to your knowledge, had any intoxicating liquor or anything of that kind with your dinner that night?

A. Well, just before we laid down there, we brought out a quart of beer and the four of us had a glass of beer apiece.

The Court: That was in the afternoon?

The Witness: That was in the afternoon.

Q. By Mr. McKnight: That was before you left Antelope? A. Yes.

Q. Had any of you had anything since then? [182]

A. Absolutely not.

Q. Had you had anything else except this one bottle between you? A. No, sir.

Mr. McKnight: That was a surprise to me.

The Court: What?

Mr. McKnight: The bottle of beer.

The Court: You mean you were surprised?

(Testimony of Peter Badostain)

Mr. McKnight: No, I didn't know about it. That is why I asked another question, "At Antelope"—

The Court: That is one of the things that men go on a trip for.

Mr. McKnight: Yes, I realized that, your Honor. I might have known, your Honor, but it just never occurred to me.

Q. When you left Merced, after having something to eat, who started driving? A. Mr. Uarte did.

Q. And when you left Merced, was it raining?

A. No, it wasn't.

Q. When you left Merced, was the pavement wet?

A. No; it was dry.

Q. And what did you do?

A. I got in the back seat and went to sleep.

Q. Did you go to sleep immediately after you left [183] Merced? A. Well, as far as I remember, yes.

Q. And up to the time you went to sleep, did the pavement continue dry?

A. As far as I remember. I didn't wake up until the accident.

Q. And the last that you remember, will you state approximately how fast Mr. Uarte was driving?

A. Well, we made it a habit of going around 50 miles an hour.

Q. Is that the speed that he was driving?

A. Approximately.

Q. When you went to sleep?

A. I didn't go up and look. I laid down in the back seat.

Q. And at that time the pavement was dry?

A. The pavement was dry.

(Testimony of Peter Badostain)

Q. What was the next thing you remember about the accident?

A. The next thing I remember about the accident was the bump.

Q. The crash?

A. The crash, and then we went over some place else and I don't know what happened after that.

Q. Do you remember anything about the accident except [184] you woke up with the crash?

A. I woke up with the crash; we stopped and they hollered at me to see if I was all right, and I got out.

Q. Did you see or feel more than one crash?

A. I don't remember whether I did or not.

Q. You don't know? A. I don't know.

Q. You don't know.

The Court: Were you injured?

The Witness: No, I was not.

Q. By Mr. McKnight: When Mr. Uarte's car stopped, what did you do?

A. Well, I jumped out and started looking for Uarte.

Q. And did you find him?

A. Well, not right away. I had my shoes off and I went back in the car and got my shoes and got the flash-light, because it was awfully dark and it was raining at the time.

The Court: Uarte was not in the car?

The Witness: No, he was not.

Q. By Mr. McKnight: And where did you find him?

A. Out in the center of the street.

Q. On the pavement?

A. Between our car and the truck on the pavement.

The Court: On the pavement?

The Witness: On the pavement, yes, sir. [185]

(Testimony of Peter Badostain)

Q. By Mr. McKnight: What condition was he in?

A. Well, I thought he was dead, and so did everybody else. He was just lying there still.

Q. Did he try to get up and move?

A. After a few seconds, he tried to get up.

Q. You don't know whether or not he had crawled a little bit or not before you got to him?

A. No, I don't.

Q. You just found him there?

A. I just found him there.

Q. From then on, you took care of him?

A. From then on, I stayed right with him.

Q. Do you know anything about this accident that you haven't told us? A. That is all.

Mr. McKnight: That is all.

Cross-Examination

By Mr. Deutz:

Q. I believe you testified you woke up at the time of the impact with the truck? A. Yes.

Q. You were not awake at any time prior to the actual impact? A. Absolutely not. [186]

Q. Prior to the actual impact, did you feel any bump or anything behind you? A. No, I didn't.

Mr. Deutz: That is all.

The Court: Step down. The next witness.

Mr. McKnight: Mr. Layana.

Mr. Deutz: Oh, I would like to ask one more question, please.

The Court: All right.

Q. By Mr. Deutz: At Merced did you have anything done in regard to the tires of the car?

A. No—At Merced, yes, we fixed one flat tire.

(Testimony of Peter Badostain)

Q. You fixed a spare tire?

A. Well, a spare tire.

The Court: A spare?

The Witness: Yes.

The Court: All the other tires were good?

The Witness: Absolutely.

Q. By Mr. Deutz: Did you examine all the other tires?

A. Well, they were all good tires when we left Los Angeles on the trip.

Q. What condition were they in?

A. They were in fairly good condition.

Q. Did they have any tread on them?

A. Yes, they did. [187]

Q. They were not slick?

A. Not to my knowledge, they weren't, no.

Q. Then, you could see a visible, clear tread on the tires?

A. Well, I don't remember, to tell you the truth, right now.

Mr. Deutz: That is all.

Redirect Examination

By Mr. McKnight:

Q. Did you have any feeling, do you remember, of considering those tires to have been in bad shape, or anything of the kind?

A. No, no. They were in good shape when we left.

Mr. McKnight: That is all.

The Witness: We wouldn't go clean to Elko on bum tires on a trip.

The Court: All right.

Mr. McKnight: Mr. Layana.

CEFERNEO LAYANA,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your full name?

The Witness: Ceferneo Layana. [188]

The Clerk: What is your address?

The Witness: 2725 Ohio Avenue, South Gate.

Direct Examination

By Mr. McKnight:

Q. Mr. Layana, do you remember leaving Merced that night? A. Yes, sir.

Q. Who was driving when you left Merced?

A. Mr. Uarte.

Q. And where were you sitting after you left Merced?

A. I was sitting in the front seat.

Q. And what did you do, what did you proceed to do, if anything? A. Sleep.

Q. You went to sleep. Before you went to sleep, was the road wet or dry? A. It was dry.

Q. At that time approximately how fast was Mr. Uarte driving?

A. He was going between 45 and 50.

Q. And after you began to doze, did you know how fast he was traveling?

A. I didn't pay any attention to that.

Q. Did you realize that it was raining up until the [189] accident?

A. Yes, a couple of different times I waked up and knew it was raining, but he was driving so it didn't mean anything to me, so I went back to sleep.

Q. You were still half asleep? A. Yes.

(Testimony of Ceferneo Layana)

Q. All right. What was the first thing you knew with reference to this accident?

A. The first thing we knew, we were going right along when something suddenly woke me up. I don't know what.

Q. And do you know what woke you up?

A. I don't know what.

Q. You don't know whether it was a bang, a jar or jerk, what it was?

A. Well, kind of a jerk or something, and when I woke up, there were two lights right in front of us.

Q. Then what happened?

A. I just put my elbow up and by that time we were hit.

Mr. McKnight: That is all.

The Court: Cross-examine. Were you hurt?

The Witness: I only had a little bruise on my shoulder. [190]

Cross-Examination

By Mr. Deutz:

Q. Mr. Layana, I believe you just testified that you felt a bump or something, is that correct?

A. It was something. I couldn't tell what it was.

The Court: He said a jerk or something.

The Witness: A jerk or something.

Q. By Mr. Deutz: You felt a jerk or something. Do you remember Mr. Walter Chandler interrogating you on the night of the accident and asking you certain questions? A. Yes, sir.

Q. And do you remember Mrs. Maude Cook taking down those statements at the time, the lady sitting back there in the blue coat?

(Testimony of Ceferneo Layana)

Mr. McKnight: It is stipulated that this is an authentic record.

The Witness: There was some lady there. I don't just remember who it was right now.

Mr. Deutz: I see.

Q. Do you recall this question being asked you at that time:

"Do you remember of hitting any one, or colliding with anything before you hit the big milk truck?"

And you answered,

"I don't remember it."

Mr. McKnight: Now, if this is intended to be impeach- [191] ment, I object to it because it is not the slightest impeaching, your Honor.

The Court: Well, from his statement that he felt a jerk or something and from the testimony of the driver of the truck before, I have no doubt but what you will argue that I should infer that the driver of the station wagon clipped him, clipped the driver of this car.

Mr. McKnight: Yes, your Honor, but there is nothing in his statement that is contrary to what he has testified to. That is my point. He does not remember it. He didn't testify he remembered hitting anything.

The Court: The objection is overruled. It all goes to something—It is admissible. He had answered it, hadn't he?

The Witness: Yes, that is correct.

Mr. Deutz: Just a moment, please. That is all.

Mr. McKnight: That is all, Mr. Layana.

The Court: He may be excused. Next witness.

Mr. McKnight: Just a moment, if your Honor please. Mr. Deming, will you take the witness stand? [192]

LAWRENCE DEMING,

recalled as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McKnight:

Q. Mr. Deming, you have stated that you found the body of one of the Navy men beneath the wheels of the trailer, was it? A. That is right.

Q. Of the trailer as shown in one of the photographs here? A. That is right.

Q. Where did you find the body of the other Navy man?

A. The other Navy man was in the southbound lane, between the station wagon and the right side of the trailer.

Q. On the pavement?

A. Just about halfway between; on the pavement.

The Court: And where did you find Mr. Uarte?

The Witness: He was to the south of the trailer, I would say.

The Court: On the pavement?

The Witness: Yes, in the southbound lane.

The Court: About how far between the trailer—

The Witness: He was approximately 20 or 30 feet ahead [193] of the trailer, I believe.

The Court: Ahead of this car?

The Witness: No. He was ahead of the trailer.

The Court: Well, the trailer was headed south and he was headed northerly; in other words, he was about half-way between the trailer—

The Witness: That is right.

The Court: —and his own car?

(Testimony of Lawrence Deming)

The Witness: That is right.

The Court: On the pavement?

The Witness: On the pavement.

Mr. McKnight: That is all.

The Court: All right. Cross-examine.

Mr. Deutz: Just a moment, please.

Cross-Examination

By Mr. Deutz:

Q. Officer, I would like to ask you—I will show you first—

The Court: Exhibit 14.

Q. By Mr. Deutz: —Exhibit 14, the plaintiff's, and I will ask you if in regard to positions marked on this map or on this diagram you can identify the positions of the respective bodies of the deceased and injured parties in this accident? [194]

A. I think I can.

The Court: Did you ever see that diagram before?

The Witness: Yes, I believe I did, your Honor.

Q. By Mr. Deutz: I believe you testified at the trial at Madera?

A. Yes, sir, I did.

Q. At that time you were aware of the fact that they had a blackboard that was used at that time?

A. Yes.

Q. And this is a photostatic copy of that blackboard. It has already been so stipulated.

A. Yes.

Mr. Deutz: I wonder if in this position now you can show the relative positions of the bodies? There are some positions taken as P-1, 2 and 3. If those coincide with your views on the subject, will you identify the positions and whose bodies are there?

(Testimony of Lawrence Deming)

Mr. McKnight: To which we object on the ground that those were not placed there by the witness. He can place them, if he remembers.

The Court: They were not placed there by the witness, nor is that photograph in evidence. Of course, you can lay a foundation for it and put it in evidence. Have you the one that is in evidence, Mr. Clerk, Exhibit 13?

Mr. Deutz: 13. [195]

The Clerk: That was a two-sheet diagram in evidence.

Mr. Deutz: I have it here.

The Court: Oh, all right.

Mr. Deutz: Now, 13, we can ask you to testify on the basis of No. 13 and show the relative positions of the bodies in this case.

The Court: Can you see this, Mr. McKnight?

Mr. McKnight: Yes.

The Witness: I would place Mr. Uarte's somewhere in here (indicating).

Q. By Mr. Deutz: Now, that is on the southbound lane? A. The southbound lane.

Q. Directly opposite the tractor and about how far in from the edge of the pavement?

A. I think it was, as near as I can remember, he was in the center of the pavement.

Q. He was in the center?

A. Between the white line and the west shoulder, the pavement edge.

Q. Halfway between the outer edge of the shoulder and the white line dividing the center of the highway?

A. Well, he was between the white line and the west pavement edge.

Q. Oh, where the—

A. Where the— [196]

(Testimony of Lawrence Deming)

Q. Where the shoulder began?

A. Where the shoulder begins.

Mr. Deutz: I see.

The Court: Was he about opposite the head of the tractor?

The Witness: No, sir. As close as I can recollect, he was just about opposite, east of the tractor.

Q. By Mr. Deutz: Directly east of the body of the tractor?

The Court: And the other body lie about halfway between the station wagon—

The Witness: That is right.

The Court: —and the trailer, as you have indicated on this exhibit?

The Witness: That is right.

Q. By Mr. Deutz: And the sailor's body?

A. Was underneath the left rear duals—rather, his head was facing east.

The Court: Well, it was in the position shown in the photograph?

The Witness: That is right. That is the way it was.

Q. By Mr. Deutz: Did you have occasion to examine the vehicles at the scene of the accident, specifically?

A. Not too closely.

Q. Did you examine Mr. Uarte's vehicle? [197]

A. I kicked the tires, also, on it.

Q. What did you discover in regard to the tires on Mr. Uarte's vehicle?

A. That the left rear tire and the right front tire were flat.

Q. The left rear and the right front were both flat?

A. That is right.

(Testimony of Lawrence Deming)

Q. On the right front tire, was there any indication that it had been gouged by anything, or that it had become flat in anything other than the normal course of events? A. To my knowledge, I don't remember.

Q. There was no portion of the vehicle sticking into the tire or anything crashed against it?

A. I don't remember that.

Mr. Deutz: That is all.

Redirect Examination

By Mr. McKnight:

Q. You know that Mr. Uarte was not dead, don't you?

A. That is right.

Q. Do you have any way of knowing whether he had crawled or worked himself into a position on the highway different than from that in which he originally lay when he hit the pavement?

A. When I first saw him, as best as I can remember, he [198] was lying there covered up with some coat or something from one of the cars.

Q. You don't know whether or not he had crawled on the highway or not, before anyone got to him?

A. No, I don't.

The Court: You have had experience with blowouts and skids?

The Witness: Only one blowout before.

The Court: I mean on other cars?

The Witness: Yes, I have seen other cars.

The Court: Will they blow as they are skidding without leaving any particular marks on the tire?

The Witness: Well, it blows out.

(Testimony of Lawrence Deming)

The Court: In other words, a car can skid and the tire won't explode, but it will go flat and the air will blow out of it?

The Witness: Yes.

The Court: That is all.

Mr. McKnight: That is all.

The Court: The witness may be excused. Is that your case except for the medical testimony?

Mr. McKnight: Well, except that Mr. Uarte has not been cross-examined.

The Court: Oh, I forgot all about that. And I have one or two other questions to ask him. Will you take the [199] stand again, Mr. Uarte?

ERNEST JOHN UARTE,

the plaintiff herein, called as a witness on his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Continued)

By Mr. McKnight:

Q. Mr. Uarte, I think I asked you when you were on the stand before about your present condition in reference to your chest, and you described your present condition in that connection.

What about your leg at the present time?

A. It is still weak.

Q. Are you able to walk distances, long distances, on it, or to use it to exert very much with it?

A. No, I am not. I can't run at all, and I can't walk too far. It tires out on me.

(Testimony of Ernest John Uarte)

Q. Did you have any particular form of exercise that you were performing before this accident happened?

A. Yes. I used to play handball quite a bit, and I used to play golf.

Q. Have you been able to play either since the accident? [200]

A. No, I haven't.

Q. Do you feel that you are able to play either now?

A. No. The doctor told me that I should never play handball again.

Q. And what about golf; do you feel that you could last 18 holes in it?

A. Oh, no, I know I couldn't.

Q. All right. Now, do you remember—We were not able to stipulate on this, your Honor, so I have to go into it—

The Court: Oh, on the matter of doctor bills?

Mr. McKnight: Yes, your Honor. We do not have our receipted bills. I am trying to get them from the doctor. I hope to be successful. But Mr. Uarte did not bring those with him, and so he has to testify from his memory, and counsel didn't feel justified in accepting that.

The Court: O.K.

Q. By Mr. McKnight: Will you state to the Court the amount of your hospital bills at the Dearborn Hospital, if you remember the amount?

A. The doctor bill was \$500.00.

Q. The doctor bill was \$500.00?

A. Yes.

Q. Was that paid?

A. Yes, that was paid. I paid that. [201]

Q. And the hospital bill was how much?

A. The hospital bill was around fifteen hundred, I think it was fourteen hundred and ninety something.

(Testimony of Ernest John Uarte)

Q. To refresh your memory, was it \$1,491.25?

A. That is right; that is it.

Q. And what did you pay for your special nurse before your sister and mother took charge?

A. I think I had a special nurse for two days or three days. I think it was around \$30.00.

Mr. McKnight: \$30.00. That is all.

The Court: Cross-examine.

Mr. Deutz: Your Honor, I move that this testimony on damages be stricken; that either the receipted bills or the statements from the persons who received payment would be the best evidence.

Mr. McKnight: I can't see that it is the best evidence.

The Court: Motion denied. All that is is corroborative. He can testify to it all right, that that is what he paid.

Mr. McKnight: He doesn't have to have a receipted bill to show he paid it.

The Witness: I paid it, your Honor.

Cross-Examination

By Mr. Deutz:

Q. Now, Mr. Uarte, I believe you testified you were in [202] the armed services, is that right?

A. Yes, sir.

Q. And in what branch of the armed forces?

A. I was in the Army, sir.

Q. And you served in the European theatre?

A. Yes, sir

Q. What particular branch of it?

A. I was in the Counter Intelligence. I was with the screening headquarters.

(Testimony of Ernest John Uarte)

Q. Were you injured at any time overseas?

A. No, sir.

Q. The automobile that was damaged in this accident, that was a 1941 Ford? A. A 1941, yes, sir.

Q. And where did you buy that?

A. I bought it in Los Angeles.

Q. Do you remember what you paid for it?

A. No, I don't.

Q. Do you remember who you bought it from?

A. I know where the dealer is located, but I don't remember his name.

Q. Where was the dealer located?

A. East Los Angeles, on Whittier Boulevard.

Q. And when did you buy that car?

A. In 1941. [203]

Q. In 1941? A. Yes, sir.

Q. You bought the car before the war?

A. Yes, sir.

Q. I see. Now, did you read the complaint in this action before it was filed?

A. You mean—I don't remember whether I did or not. I have read so many—

Q. Mr. McKnight filed a typewritten complaint in this action.

The Court: Do you want the file, the original?

Q. By Mr. Deutz: Mr. McKnight prepared this complaint, I presume. Did you read this complaint before it was filed?

A. That I don't remember. As I said, I have read so many complaints, I don't know which I have read.

(Testimony of Ernest John Uarte)

Mr. McKnight: Do you want me to answer that, counsel? I can.

Mr. Deutz: Well, I will let you stipulate in a moment. I want to ask a question right now.

Q. You say you have read so many complaints. How many complaints have actually been filed in cases involving this accident?

Mr. McKnight: To which we object as immaterial, if your Honor please. [204]

The Court: Objection sustained.

Q. By Mr. McKnight: I call your attention to Paragraph VI of the plaintiff's complaint on file in this action and ask you in regard to the quoted language and I will quote the language, as follows:

"That on or about July 24, 1946, on U. S. Highway No. 99, approximately two miles north of the City of Madera, County of Madera, State of California, said Richard Francis Rogers and said Roger Davis Green negligently drove, operated and used said Ford station wagon, and defendant Don Arthur McCoy negligently drove, operated and used said tractor and semi-trailer, and thereby caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by plaintiff, and caused said Ford sedan automobile to come into collision with said tractor and semi-trailer, injuring and damaging plaintiff and his said Ford sedan automobile as is hereinafter described."

Now, that statement or that paragraph of your complaint, do you remember reading that?

A. No, I don't.

(Testimony of Ernest John Uarte)

Q. Do you remember giving that information to Mr. McKnight on which he based that statement?

A. I gave him some information; I don't know whether those words or not. [205]

Q. Did you tell Mr. McKnight that you were struck by the Navy station wagon?

A. I don't remember whether I did or not.

Q. Do you have any idea how Mr. McKnight, filing this complaint in your name, happened to have that information in his complaint?

A. I don't. I might have given it to him. I don't remember. My memory isn't any too good yet.

The Court: Before Mr. McKnight filed it, you told him everything that you remembered about the accident, didn't you?

The Witness: Yes, your Honor.

The Court: Did you dictate that complaint?

The Witness: I don't know, your Honor.

The Court: Well, did you dictate it to a stenographer?

The Witness: I don't believe so, your Honor.

Q. By Mr. Deutz: Mr. Uarte, what was the condition of the tires on your car?

A. I don't remember.

Q. Do you know? You wouldn't know whether they were in good condition, they were new or old?

A. I don't remember leaving home, so I don't know what condition.

Q. You don't remember leaving home?

A. No, sir. [206]

Q. Mr. Uarte, have you been paid any compensation on any claim involved in this case.

(Testimony of Ernest John Uarte)

Mr. McKnight: To which we object on the grounds it is incompetent, irrelevant, and immaterial, not within any issue of the case, not effective on the issue of damages in any way, whether or not he did. The fact is, in California, in the case of Lomey vs. The Interstate Transit Company, the citation of which I do not remember, a question of that type in reference to an automobile damage case was held to be prejudicial error which resulted in a reversal of the case.

Mr. Deutz: I imagine that was a jury trial.

Mr. McKnight: It was a jury trial. I don't suppose it is prejudicial error in this case.

The Court: I imagine that is immaterial. He is suing for damages here and whatever the rights or liabilities that third parties might have—

Objection sustained. I can't see how, even if the Golden State Milk Company paid him money, it would seem to me that it would be wholly immaterial, because under the law people have a right to make a settlement of a claim in order to merely avoid the issue of litigation, if they wish.

Mr. McKnight: May the record just show that there was no such settlement made, however. That is right.

The Court: Well, I was just trying to resolve in my mind— [207]

Mr. Deutz: There is no proof on that point, your Honor.

The Court: —all of the possible contingencies that might be developed by the question, in order that I might rule, and that seemed to be one of them.

Mr. McKnight: I understand, your Honor.

(Testimony of Ernest John Uarte)

Q. By Mr. Deutz: What were your duties at the Bank of America, Downey Branch?

A. I was G.I. coster. I had charge of the Veteran Home Loans.

Q. How long had you been in that particular specialty at the bank?

A. I believe I had—It was around the first of 1946 that we inaugurated that department, and I believe I took it over.

Q. And you took charge of that?

A. Yes; I was the first man to take charge of it.

Q. What were your duties in that line?

A. In that line I made the home loans to the veterans.

Q. Did you make a number of loans for the veterans there?

A. I guess I did. I don't remember how many I made, but then we have quite a few there. In fact, we have a lot of them.

Q. And you started, that department was opened in 1946, wasn't it? A. Yes. [208]

Q. What was your salary at that time?

A. I think it was either two hundred and seventy or two hundred and seventy-five.

Q. Two hundred and seventy or two hundred and seventy-five, in 1946? A. Yes.

Q. Did you receive any raises after that?

A. That two hundred and seventy—

Q. Prior to the accident?

A. That two hundred and seventy includes a blanket raise that we received in, I think it was June. Before that, I do not remember what I was making, but we did receive a blanket raise, I believe, I don't know when it was, June or July.

(Testimony of Ernest John Uarte)

Q. June or July of 1946?

A. I do not remember when it was.

Q. Did your duties change any during that period?

A. Well, I don't remember.

Q. But you were handling G.I. loans?

A. Yes, I think I was. In fact, that is what they—

Q. You are not so sure, now?

A. Well, I don't remember what I was doing. I was making G.I. loans.

Q. You are losing your memory for this—

Mr. McKnight: Let him finish. [209]

Mr. Deutz: Go ahead.

Mr. McKnight: Explain what you were going to say.

The Witness: When I went back, they told me they was giving me my old job back, making veteran loans. Now, as far as making the loans, actually making the loans, I don't remember.

Q. By Mr. Deutz: When you went back to your job after the accident, you stated you had to be specially trained for that job again, because you had forgotten everything that happened before the accident?

A. Yes.

Q. How long did they train you to take over that job again?

A. The man that took my place when I was on vacation, he was with me, oh, I don't know how long, a couple of months or so, and then he went back to escrows, and whenever I needed any help, I would go back to him.

Q. In that two months' time you took over the G.I. loan section again and were in position to handle it entirely by yourself?

A. Well, no; I still needed help.

(Testimony of Ernest John Uarte)

Q. But you didn't have any previous experience to draw on?

A. Well, it came back to me. When I started working there, it seemed to come back, but I still needed assistance. [210]

Q. But as you began doing the work again, being the duties you were performing prior to the accident—

A. My duties came back to me. Whether it came back as a recollection or not, I don't know.

Q. Did anything else come back to you about what had happened prior to that accident, excepting your duties?

A. No, sir. I do not have any recollection of when I left here, what I did, or anything.

Q. You have no recollection of leaving Sacramento?

A. No, sir.

Q. No recollection of driving down the highway?

A. No, sir.

Q. No recollection of a collision or impact?

A. No, sir.

Q. Or injury or anything of the sort?

A. No, sir.

Q. Now, on August 5, 1946, a Mr. Walter Chandler, Assistant District Attorney, Madera County, and Mrs. Maude Cook, the reporter there, visited you at the Dearborn Hospital in Madera. Do you have any recollection of that visit? A. No, sir.

Q. No recollection whatever? A. No, sir.

Q. You have no recollection of anyone speaking to you [211] about anything in connection with this case, at the hospital, while you were there? A. No, sir.

Q. Have you ever seen Mrs. Maude Cook before today? A. No, sir. Who is she?

(Testimony of Ernest John Uarte)

Q. She is the lady in the blue coat here. Would you stand up, Mrs. Cook? Over there (indicating)?

A. No, sir.

Q. And I believe you testified that you have no recollection of anything prior to the latter part of August, 1946, is that correct?

A. That is right, sir.

Mr. Deutz: Just a moment.

Q. I believe you testified that your leg was in a traction splint or a brace, and that you were using crutches from the time that you were discharged from the hospital until Mother's Day of 1947?

A. Yes, sir. That is when I took my brace off.

Q. In other words, that was approximately nine months from the time of the injury?

A. I presume so, yes, sir.

Q. And in nine months the injury to your leg—that was the femur that was injured, wasn't it, the upper bone in the leg?

A. Yes, sir. [212]

Q. —that bone had not healed in that period?

A. It had healed, but the doctor told me to watch it, there was a chance of rebreaking it.

Q. What type of fracture was it?

A. All I know is my leg was broken.

Mr. Deutz: Just a moment. I think that is all.

Redirect Examination

By Mr. McKnight:

Q. I forgot to ask you this, Mr. Uarte: After you left the Dearborn Hospital and went back south, did you

(Testimony of Ernest John Uarte)

have any physician in attendance or taking care of you after you got down there?

A. I went down to the Naval Hospital in Long Beach once a month for a physical checkup. They took x-rays of me down there.

Q. And they advised you and took care of your braces, and that kind of thing? A. Yes, sir.

Q. What about these braces—you said that you couldn't put them off and on and you needed assistance, when you were wearing them, and so forth; were they taken off and on every night, or what was the situation?

A. No. The brace was disconnected from my shoe. My shoe was taken off and my brace was loosened. It wasn't [213] taken off because the doctor told me that I should never take it off at night, due to the fact that the muscle would contract and rebreak the leg, there was danger of it.

Q. So you had to sleep and have that brace on 24 hours a day? A. Yes, sir.

Q. Was it heavy? A. It sure was.

Q. Was it comfortable? A. No, sir.

Mr. McKnight: That is all.

The Court: That is all.

Q. By Mr. McKnight: Were you at any expense while you were at the Naval Hospital in the south?

A. No, sir.

Q. That was service furnished by the government?

A. That is right.

The Court: If he was at no expense, the services were furnished to him. Step down.

Mr. McKnight: That is the plaintiff's case.

The Court: Except for the medical testimony?

Mr. McKnight: Except for the medical testimony, which we will ask the privilege of presenting when it seems best to hear it, your Honor.

The Court: All right. Proceed. [214]

Mr. Deutz: Well, your Honor, at this time the plaintiff has not rested his case due to the fact that the medical testimony has not been heard, but if the Court would consider the case otherwise determined or otherwise presented, as far as the negligence features are concerned, at this time I would like to make a motion that this action be dismissed on the ground that there is a total failure of proof that there was any negligence on the part of the government vehicle in this particular case.

The only straw that the plaintiff has in that connection is the inadvertent statement of Mr. McCoy made on the night of the accident where he said that something happened, the cars either bunched or skidded.

The Court: Under the rule, we can take these motions under submission and hear the rest of the testimony. So, in view of the fact that you have other witnesses here, I think we probably better proceed to dispose of the testimony, so that they will not be further inconvenienced, and I will take your motion under submission and dispose of it at the conclusion of the trial.

Mr. Deutz: Very well, your Honor.

The Court: Call your witnesses.

Mr. Deutz: I believe I will call Mrs. McCoy at this time. [215]

DOROTHY McCOY,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, please?

The Witness: Dorothy McCoy.

The Clerk: And your address?

The Witness: 10942 Apricot Street, Oakland.

Direct Examination

By Mr. Deutz:

Q. Now, Mrs. McCoy, are you the wife of Don McCoy, who previously testified in this case?

A. That is right.

Q. On July 24, 1946, when the accident in question occurred, were you riding with Mr. McCoy?

A. I was.

Q. Now, as Mr. McCoy has testified, you were north-bound from Los Angeles to Oakland, is that correct?

A. That is right.

Q. At what time had you left Los Angeles?

A. It might have been around about 3:00 o'clock in the afternoon.

Q. Around 3:00 in the afternoon?

A. Yes. [216]

Q. And had you stopped along the way?

A. Yes.

Q. Had you stopped for fuel or dinner?

A. Yes, we stopped for dinner, fuel, and we stopped and bought a milkshake.

Q. As you approached the scene of the accident, this was approximately 11:30 in the evening, do you recall seeing these particular cars approaching you from the opposite direction?

A. No, I don't.

(Testimony of Dorothy McCoy)

Q. Do you recall seeing their headlights at all?

A. Not until the car swerved across the road.

Q. Not until the car swerved across the road. At that time you saw a pair of headlights swerve toward you, is that correct?

A. That is correct.

Q. Did you see only one pair of headlights at that time or did you see more than one?

A. No; I only saw one.

Q. Did you see a pair of headlights behind the car that swerved?

A. I did not.

The Court: Were you sleeping?

The Witness: No, sir.

The Court: Had you been? [217]

The Witness: No, sir.

Q. By Mr. Deutz: Had you passed any other cars immediately prior to this accident?

A. No.

Q. And where was your husband's vehicle in relation to the road; was it in the northbound lane?

A. Yes, that is right.

Q. And in what relation to the center line?

A. I would say it was to the extreme right.

Q. To the extreme right. Was it on the shoulder?

A. No.

Q. Or was it on the pavement?

A. It wasn't on the shoulder.

Q. Or was it on the pavement?

A. It was on the pavement.

The Court: That is customary to drive there?

The Witness: Yes.

Q. By Mr. Deutz: At no time did you see two pairs of headlights coming towards you at once?

A. I did not.

(Testimony of Dorothy McCoy)

Q. Now, this car that was coming toward you, you say it swerved very suddenly?

A. Yes, it did.

Q. Approximately how far was it from you at the time it began to swerve? [218]

A. I would say about 50 feet.

Q. About 50 feet. What portion of the truck did that car hit when it first came in contact with it?

A. Well, it seemed to me that it hit toward the right.

Q. On the right? A. Yes.

Q. In front? A. Yes.

The Court: Your side?

The Witness: Yes, sir.

Q. By Mr. Deutz: Do you recall how many shocks or impacts that you felt?

A. There were several.

Q. You felt several? A. Yes.

Q. Was there a difference in intensity between the different blows?

A. It seemed that the first two were sharper than the others.

Q. The first two were sharper than the others, but there were at least more than two?

A. Yes, I think there were more than two.

Q. After this first car struck you, do you have any definite recollection of being struck by another car? [219]

A. No. I did not know whether it was another car or whether we had hit the same car again.

The Court: Twice?

The Witness: Yes, sir.

Mr. Deutz: That is all.

(Testimony of Dorothy McCoy)

Cross-Examination

By Mr. McKnight:

Q. Mrs. McCoy, your husband was driving, was he not? A. That is right.

Q. You have driven with him many times, I take it?

A. Yes, I have.

Q. You have confidence in his driving, do you not?

A. Yes, I do.

Q. I assume you were not paying too much attention to other traffic until this thing all started?

A. No, sir; that is right.

Q. So the first thing that attracted your attention was when you saw a car swerve across suddenly in front of you? A. That is right.

Q. What was on the highway before that time you just weren't paying any attention to? A. No, sir.

Mr. McKnight: That is all. [220]

The Court: Step down. The next witness.

Mr. Deutz: Sergeant Gill, please.

CLARK K. GILL,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: The first name is Clark; the middle initial is "K"; the last name is Gill.

The Clerk: And your address, please?

The Witness: 124 South "I" Street, City of Madera.

The Clerk: "I" or "High"?

The Witness: "I."

Mr. Deutz: Where are those photographs?

The Court: Here they are.

(Testimony of Clark K. Gill)

Direct Examination

By Mr. Deutz:

Q. Sergeant Gill, I will show you a series of photographs marked Exhibits 2 through 12, inclusive, and I will ask you if you took those particular photographs?

The Court: Is there any question about it?

(Witness examines photographs.)

Mr. McKnight: He took them all but one, your Honor. [221]

The Witness: Some of these I didn't take, your Honor.

The Court: That is Plaintiff's Exhibit 2.

Mr. McKnight: All except one, all except Plaintiff's Exhibit 2.

The Witness: Except this one.

The Court: All but the daylight picture of the station wagon?

The Witness: That is correct; yes, sir.

The Court: All right.

Q. By Mr. Deutz: Now, Sergeant Gill, you have heard Officer Deming's statement as to the relative positions of the vehicles and the relative positions of the bodies in this particular case. From your examination of the scene of the accident, would your statement as to those positions be any different than Officer Deming's?

The Court: As demonstrated here by Exhibit 13? Do you have the original there some place?

Mr. Deutz: I have it here. Exhibit No.—No, this is No.—

The Court: No, it is a two-sheet affair.

Mr. Deutz: I have only one part of Exhibit No. 13.

(Testimony of Clark K. Gill)

The Witness: Here is a part here that you may be looking for.

The Court: They probably ought to be clipped together, Mr. Clerk. [222]

The Clerk: Yes, your Honor.

The Court: You have examined that?

The Witness: Yes. My testimony would be the same, your Honor, with the exception of the bodies.

Q. By Mr. Deutz: It is not in what particular—Now, for the purposes of the record, what time did you arrive at the scene of this accident?

A. I received the call at 11:55 from the Sheriff's office. We picked up Mr. Chandler and Mrs. Cook or phoned them at 11:56. At 12:10 the next day, Thursday, the 25th, we arrived at the scene of the accident that day, the Assistant District Attorney, Mrs. Cook and ourselves.

Q. And at that time you found the positions of the vehicles approximately as set forth on Exhibit 13?

A. Yes, sir.

Q. And at that time you noticed the positions of the bodies?

A. When I arrived there, the injured had all been removed. The only body I saw was the body of an enlisted man under the right rear duals, the right—the left rear duals of this trailer that was crosswise on the road, with the rear axle on the white line, whom at 2:10 that morning I learned from the coroner was identified as a Mr. Rogers.

Q. In what respects in that regard would your testimony differ from Officer Deming's? Did you state there [223] would be any difference on that?

A. No. The fact I had no knowledge of the other bodies.

(Testimony of Clark K. Gill)

Q. Of the other bodies?

A. I had no knowledge of the other bodies at all.

Q. Did you make an examination of the vehicles at that time?

A. Yes, we made an examination of the vehicles.

Q. Did you notice or did you examine Mr. Uarte's vehicle? A. Yes.

Q. Did you notice the condition of the tires on that vehicle?

A. Yes; I believe a couple of them were not in any too good shape. Which two they were, though, I don't remember.

Q. Just what do you mean by not being in too good shape?

A. Well, didn't have too much tread. There were no bald spots on them, but a couple of them were pretty worn off.

Q. Were they slick?

A. No; they weren't exactly slick.

Q. A very faint tread on them?

A. I believe two. [224]

Q. Do you have any recollection as to the other two tires? A. No.

Q. Just two that you particularly noticed as being poor?

A. I just have a hazy recollection that two of them were poor.

Mr. McKnight: Just a moment. He didn't say they were poor.

Mr. Deutz: Would you say in your estimate, from your experience in driving vehicles and observing tires, were these tires good or poor?

(Testimony of Clark K. Gill)

The Court: "Poor" is too relative a term. I think he said they were not in too good condition.

Q. By Mr. Deutz: Was there very much gripping surface left on the tires?

Q. Yes, the tires were fair. I wouldn't say they were real poor or they were real good; they were fair.

Q. Sergeant Gill, in your opinion, if an automobile is driven at approximately 80 miles per hour on a slippery, slick road, how long would it take to decelerate that vehicle to approximately 40 miles per hour?

Mr. McKnight: To which we object on the grounds it calls for a conclusion and an opinion of the witness, and it is a question that is not the subject of expert testimony. [225]

The Court: I think, counsel, it all depends on the weight of the automobile and the circumstances, the make, whether it is a two-wheel brake, a four-wheel brake, manual brake, hydraulic brake, whether also somebody put on the emergency brake at the same time they put on the foot brake, and how much pressure they exercise when they put the brake on.

Mr. McKnight: And even with the same vehicle, it would act differently in every case.

Mr. Deutz: I would be willing to qualify this witness further.

The Court: I don't know whether it would or not, but it would act probably differently with every driver.

Mr. Deutz: I will withdraw the question.

Q. Sergeant Gill, how long have you been driving automobiles?

A. I really don't know when I started. I will start my 19th year next July with the California Highway Patrol.

(Testimony of Clark K. Gill)

Q. And you had been driving for some time prior to that time?

A. When I went to work, you had to have two years motorcycle experience and five years driving a car, before you could go to work.

Q. Have you driven automobiles, sedans, shall be say, on wet and slippery roads before? [226] A. Yes.

Q. And you have had experience in applying brakes on vehicles of that sort? A. Yes.

Q. I believe the Highway Patrol generally has certain charts for braking distances on vehicles with certain loads, is that correct?

A. Section 670 of the Vehicle Code sets out distances at speeds from 10 miles an hour, I believe, up through 45.

Mr. McKnight: On dry asphalt pavement?

The Witness: That is correct. That test must be given on dry pavement only.

Mr. Deutz: That, of course, is the prima facie standard as to braking power of certain vehicles?

Mr. McKnight: To which I object on the grounds it calls for a legal conclusion and is not a subject of expert testimony.

The Court: Yes.

Mr. McKnight: I don't see the materiality of braking power.

Mr. Deutz: There was testimony by a witness for the plaintiff that the Navy vehicle passed a certain truck at 80 miles an hour.

The Court: Passed him and pulled in between him and another [227]

Mr. Deutz: Yes, in a space of a few hundred feet, driving 80 miles an hour, he slowed down to 40 miles an hour.

(Testimony of Clark K. Gill)

The Court: No. He said the other truck was a hundred yards ahead.

Mr. Deutz: Yes, that is right; he said the other truck was a hundred yards ahead.

The Court: But they were at least going 40 miles an hour.

Mr. Deutz: That is right, they were at least going 40 miles an hour, and a car coming 80 miles an hour in order to fit in that space has to decelerate.

The Court: It is too speculative. You have to figure out how many miles an hour.

Mr. Deutz: His testimony is merely to show the impracticability of that witness' statement.

Mr. McKnight: That is a question for your Honor to determine.

The Court: Yes, I think it is. There are so many improbable things that can't happen in an automobile accident. Objection sustained.

Mr. Deutz: Very well.

Q. I asked you previously about the tire of Mr. Uarte's vehicle. Did you notice which tires were flat?

A. Sir? [228]

Q. Did you notice which tires were flat?

A. When I arrived, the right front and the left front tires.

Mr. McKnight: And the left front?

The Witness: What did I say? The left rear tire; the right front and left rear.

Q. By Mr. Deutz: The right front and the left rear?

A. That is right.

Q. Did you notice the left rear fender of Mr. Uarte's car?

A. I noticed it to the extent it had been damaged, yes.

(Testimony of Clark K. Gill)

Q. Did you notice any paint marks on that at the time, or did you examine them for paint marks?

A. No. At that time we didn't. We did not examine them very closely at that time. We had quite a few traffic problems and difficulties there getting things straightened out. The towing cars were coming up. It was raining. We had a lot of outfits going through tied up. And, in fact, we held them up about 15 minutes and got the pictures and got through as quick as we could.

Q. On the rear end of the outfit, the semi-trailer, did you notice any damage to the right rear of that body of that trailer?

A. Yes, there was a scratch on the right rear side.

Q. It was a fairly heavy scratch? [229]

A. Oh, yes.

The Court: It was bumped, wasn't it, a dent?

The Witness: No. It was kind of a mark right along. It looked like something had scratched it. This is the mark here (indicating on photograph).

Q. By Mr. Deutz: I call your attention to Exhibit No. 10.

The Court: All right.

Q. Mr. Deutz (continuing): And you are pointing out the very rear of this truck here, a certain indentation.

The Court: No. He didn't point that out.

Q. By Mr. Deutz: Will you point it out?

The Court: He just pointed out the straight mark, the dark mark.

The Witness: This is the mark I pointed to (indicating on photograph). There was a slight damage in the bottom there.

The Court: A bump, a dent?

(Testimony of Clark K. Gill)

The Witness: That is right. And this here (indicating on photograph) was a rubbing disturbance of the paint there.

Q. By Mr. Deutz: The paint had been scratched at that point? A. That is right.

Q. I see. I call your attention to Exhibit 13 again, [230] on the first page of this exhibit, there are some gouge marks shown in the very southerly portion of the northbound lane, and I would ask you whether you noticed any gouge marks at that position on the night of the accident?

A. Are these the marks here (indicating on exhibit)?

Q. That is right.

A. Yes, the boys noticed that condition. I went down and looked at them.

Q. Did those gouge marks appear to be fresh?

A. At that time it was pretty hard to tell much about them. However, I was back there at 3:30 a. m., with Mr. Chandler, at which time the road had dried up considerably and the marks looked to me, I would say they were apparently fresh marks.

Mr. McKnight: Will you tell me which marks?

Mr. Deutz: The most southerly ones.

The Court: On the first page of Exhibit 13.

Mr. McKnight: Yes.

Q. By Mr. Deutz: On the second page of Exhibit 13 there are some gouge marks in the southbound lane, and I will ask you whether you noticed those gouge marks in the pavement?

A. I just got a rough look at them. All I done was take the pictures. Officer Pimley measured them. I could see the marks. There were marks there that night.

(Testimony of Clark K. Gill)

Q. Did those marks appear to be freshly made? [231]

A. They looked like it, yes.

Mr. Deutz: That is all.

Cross-Examination

By Mr. McKnight:

Q. When you went back there at 3:30, there wasn't so much water on the road?

A. No. The road had dried up considerably. It had stopped raining, and shortly after I took the pictures, I went in and developed them and then come back to the scene of the accident.

Mr. Deutz: So you could get a better look at those gouge marks?

The Witness: That is right. Traffic had gone over and absorbed a lot of water.

Q. By Mr. McKnight: From your experience, you determined in your own opinion that those were fresh gouges?

A. I would say they were fresh. They hadn't been there for two or three days. They were fairly fresh.

The Court: How deep?

The Witness: I would say about a half inch, just roughly. We didn't measure them. I would say just roughly half an inch.

The Court: I see it is 5:00 o'clock and you have eight witnesses? [232]

Mr. Deutz: I have several witnesses.

The Court: How many more witnesses?

Mr. Deutz: I have four men from the Navy here.

The Court: Are they short or long witnesses?

Mr. Deutz: Mostly very short. I think possibly 10 or 15 minutes apiece.

The Court: Well, I think maybe if we come back at 7:00 o'clock, by that time you can have your doctor here.

Mr. McKnight: I will certainly try.

The Court: And thus we can conclude all the evidence in this case today.

Mr. Deutz: Well, all right. I have Mrs. Maude Cook here: I could use her for a short witness. It will just take a moment.

Mr. McKnight: Is there anything to add to our stipulation, by her?

Mr. Deutz: Yes, I think so. I would like to ask her just one or two questions. May I call her?

The Court: Come forward, Mrs. Maude Cook.

MAUDE COOK,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Maude Cook. [233]

Direct Examination

By Mr. Deutz:

Q. And your address?

A. 220 South "I" Street, Madera.

Q. Now, Mrs. Cook, on July 24, 1946, by whom were you employed?

A. The District Attorney's office, County of Madera.

Q. In what capacity? A. Reporter.

(Testimony of Maude Cook)

The Court: Well, this is the Maude Cook that went down there and took the statements that have been mentioned.

Mr. Deutz: Very well.

Q. I direct your attention to August 5, 1946. Did you have occasion to take the statement from Mr. Uarte at the Dearborn Hospital in Madera? A. I did.

Q. What was the occasion of your going to take the statement at that time? Had you received word that you could see Mr. Uarte at that time?

A. Yes. Someone from the hospital called our office and said Mr. Uarte was conscious and if we would like to come over and speak to him, it would be perfectly all right.

The Court: And on what date was this?

The Witness: August 5th.

Q. By Mr. Deutz: And did you go to the hospital at [234] that time to take the statement?

A. I did, with Mr. Chandler.

Q. You were with Mr. Chandler. That was on the morning of August 5, 1946?

A. I believe it was just before lunch on that date, yes.

Q. And you and Mr. Chandler talked to Mr. Uarte at that time? A. Yes, we did.

Q. And did you ask Mr. Uarte certain questions?

A. Yes.

Q. And did he reply? A. Yes, he did.

Q. Now, I believe that the statement will show that Mr. Uarte stated to you at that time that he had no

(Testimony of Maude Cook)

recollection of what transpired at the time of the accident, is that correct? A. That is right.

Q. But at the time you asked these questions, did Mr. Uarte understand the questions that were being propounded to him?

Mr. McKnight: To which we object as asking for a conclusion of the witness.

The Court: Objection sustained.

Q. By Mr. Deutz: Did Mr. Uarte reply promptly to the [235] questions that you asked him?

A. Yes, he did.

Q. Did he answer the questions that you asked him?

A. Yes.

Q. In other words, if a question was directed to any particular point, did Mr. Uarte reply to you in response on that particular point? A. Yes, he did.

Q. In other words, in your opinion, he appeared to understand the questions propounded to him?

Mr. McKnight: To which we object, same grounds as I made before.

The Court: Objection sustained.

Q. By Mr. Deutz: Did you have occasion to notice Mr. Uarte's demeanor at that time?

A. Yes, I did.

Q. Did Mr. Uarte appear to be in good health?

Mr. McKnight: To which we object.

Mr. Deutz: I will correct that. We can't very well say "good health," because I realize that the man was seriously injured.

(Testimony of Maude Cook)

Q. But I will ask you whether his mind appeared to be alert? A. It appeared to be, yes.

Q. And he was able to answer your questions? [236]

A. Yes.

Q. And at least state to the effect that he had no recollection? A. Yes.

Q. Was there anything to indicate in your conversations with Mr. Uarte that he was suffering from any mental ailment or mental injury?

Mr. McKnight: To which we object.

The Court: Objection sustained.

Mr. McKnight: As a pure conclusion.

Mr. Deutz: That is all.

The Court: Step down. Do you have any questions?

Mr. McKnight: I guess not.

The Court: All right. I think the Navy men would like to eat dinner before they go on, anyway. So we will recess until 7:00 o'clock tonight. I better make it probably about 7:30 and then everybody will have plenty of time to eat. 7:30. Will you have your doctor here then?

Mr. McKnight: Yes, sir. I will call him. May all the witnesses be excused who have testified?

The Court: Oh, yes, surely. Every witness who has testified may be excused.

(Thereupon, at 5:04 o'clock p. m., Tuesday, May 25, 1948, a recess was taken until 7:30 o'clock p. m. of the same day.) [237]

Fresno, California, Tuesday, May 25, 1948. 7:47 P. M.
(Trial resumed.)

The Court: The reporter will note an apology to counsel and everybody for being late. Proceed.

Mr. McKnight: Your Honor, we have our doctor here now. May we complete our case?

The Court: Yes.

Mr. McKnight: Dr. Solberg.

DR. LAWRENCE A. SOLBERG,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Lawrence Arthur Solberg.

The Clerk: And your address?

The Witness: 501 East Yomesite, Madera.

Direct Examination

By Mr. McKnight:

Q. You are a physician and surgeon duly licensed to practice in the State of California? A. Yes, sir.

Q. And where do you practice your profession? [238]

A. 501 East Yosemite Avenue, Madera.

Q. Is that a hospital? A. Yes, sir.

Q. A sanitarium?

A. It is the Dearborn Hospital.

Q. Were you practicing your profession there on July 24, 1946? A. Yes, I was.

Q. Doctor, how long have you been in practice?

Mr. Deutz: Counsel, we will stipulate to the doctor's qualifications.

(Testimony of Dr. Lawrence A. Solberg)

Mr. McKnight: I will appreciate that, your Honor, but I want to very shortly give to the Court some idea of his qualifications aside from being a physician and surgeon.

The Court: Well, what is he, a bone specialist or a brain specialist?

Mr. McKnight: I don't think he is a specialist.

The Witness: I am a general practitioner.

The Court: Sir?

The Witness: A general practitioner.

The Court: A general practitioner, a physician and surgeon?

The Witness: That is right.

Q. By Mr. McKnight: How long have you practiced your profession? [239] A. Since 1938.

Q. During the war, did you have any particular experience with injuries?

A. During the war, I was a flight surgeon in the Air Forces, and we had occasion to observe airplane crashes at times.

The Court: What does an applied surgeon mean? I have seen that name at times, but I don't know what it means, applied?

The Witness: It is a flight surgeon.

The Court: Oh, a flight surgeon?

The Witness: Yes.

Q. By Mr. McKnight: And in that connection you had occasion to deal with injuries on many occasions, I take it?

A. Yes. We had several injuries, quite a few of these airplane crashes.

(Testimony of Dr. Lawrence A. Solberg)

Q. And is Dearborn Sanitarium the only hospital in Madera? A. No, it is not.

Q. There are two?

A. There are three. One County and the Sanitarium and the Hospital.

Q. Now, when did you first see John Uarte, the plaintiff in this case?

A. I have here July 25th. [240]

Q. Nineteen forty what? A. 1946.

Q. Do you have the time?

The Court: Have you seen the doctor's notes?

Mr. Deutz: No, sir, I haven't, your Honor.

The Court: Do you wish to? He is referring to them. You may examine them before he looks at them, if you wish.

Mr. Deutz: I don't believe so, your Honor. I would like to ask a question on voir dire, though. I would like to ask Dr. Solberg one or two questions in regard to his notes.

The Court: All right.

Voir Dire Examination

By Mr. Deutz:

Q. Now, Dr. Solberg, those notes that you have there, are those part of a hospital record?

A. Yes, sir, they are a hospital record.

Q. And were they made by you at the time of the examinations or—

A. Some of them were and some of them were nurses' notes that they made day after day, temperature charts.

Q. Temperature charts, and things of that sort.

A. And the nurses' notes.

(Testimony of Dr. Lawrence A. Solberg)

Q. The notes you are starting to refer to there at the present time, when were those notes compiled? [241]

A. They were made after the patient came in. They weren't made already that night that he came in.

Q. Are they the result of your own observations?

A. Yes, sir, they are.

Mr. Deutz: That is all.

The Court: What you have before you are the original records, are they not?

The Witness: Yes.

The Court: Of this patient, from the time that patient was received until he was discharged?

The Witness: That is right.

The Court: And you were the attending physician and surgeon?

The Witness: Yes, I was.

The Court: To this patient, and those notes were either made by you or immediately under your direction by nurses or others in the hospital whose regular course of business it was to follow your directions, is that correct?

The Witness: That is right.

The Court: Very well.

Direct Examination (Continued)

By Mr. McKnight:

Q. All right. Can you state when you first saw Mr. Uarte, do you have the time there? [242]

A. It was in the evening of the 25th—let me see. (Witness examines papers.)

Q. Was it in the evening or the early morning?

A. Oh, it was in the early morning, 12:15 a. m.

(Testimony of Dr. Lawrence A. Solberg)

Q. Of July 25, 1946? A. Yes.

Q. All right: Will you tell the Court his general condition when you first saw him?

A. When I first saw him, he was very seriously injured; in fact, he was critical, and I didn't think that he was going to live.

Q. Was he unconscious when he came in?

A. He wasn't unconscious. He was very restless and irritable and would fight anything that you would try to do for him. We tried to put him on the x-ray table and he struggled against that, and then—

Q. Did he appear to be in possession of his faculties?

A. No, sir, he was not.

Q. Go ahead.

A. Later on, on the x-ray table, he began to—well, he began to pass out; he became so that he was unconscious.

Q. Was he bleeding from his mouth?

A. I don't recall any bleeding from the mouth.

The Court: What does bleeding from the nose indicate, Doctor? [243]

The Witness: Well, it can indicate just a contusion of the nose or it can indicate a skull fracture.

Q. By Mr. McKnight: Did you make as complete an examination of him as you could that night?

A. Yes, sir.

Q. Under the circumstances? A. Yes.

Q. Did you observe him the next day?

A. Yes, sir.

The Court: Did you give him shock treatment?

The Witness: Yes, sir.

The Court: What does that consist of?

(Testimony of Dr. Lawrence A. Solberg)

The Witness: Well, there we gave him plasma and fluids intravenously, and he had a collapsed lung, so we put him in an oxygen tent right away.

The Court: You knew that then?

The Witness: Yes.

The Court: You diagnosed that right way?

The Witness: Yes, I did. I did that by fluoroscopy.

The Court: Yes.

The Witness: And he began to go bad on the x-ray table, so we had to stop everything and put him in the oxygen tent and start—

Q. By Mr. McKnight: And did that delay the treatment of his broken bones and the care of his other injuries? [244]

A. Well, yes; it delayed it until he was out of danger, until we thought he was, that he would make the grade.

The Court: What do you mean by if he made it?

The Witness: Well, if—Ordinarily, if he just had a fractured leg, we would probably fix him up the same night that he came in, but when he had this collapsed lung and was in danger of dying, why, you wait.

The Court: Your first concern is to save his life?

The Witness: Yes, sir.

The Court: The next concern is to patch up his leg, or something; is that it?

The Witness: That is right.

Q. By Mr. McKnight: And approximately how long after you first saw him was it before you could begin to set his bones and take care of that type of injury?

(Testimony of Dr. Lawrence A. Solberg)

A. Well, you will see that was on Saturday—July 27th—that we put that pin in there, that we fixed his leg up. We fixed his leg up on the 27th.

The Court: You put that pin in, what?

The Witness: We put him in traction, put his leg in traction on the 27th.

The Court: All right.

Q. By Mr. McKnight: And did you ultimately take x-rays? [245] A. Yes.

The Court: Well, what was wrong with him when you first found out everything that was wrong with him; how did you diagnose it?

The Witness: We diagnosed the fractures by x-ray.

The Court: Well, I don't mean how you came to your conclusion, but what was your conclusion, what was your diagnosis?

The Witness: Oh, well, he had a fracture right femur, a fracture of the third—

The Court: Where?

The Witness: It was at the juncture of the upper and middle thirds, about; you will see it was about in the middle portion of the leg.

The Court: About halfway in the thigh?

The Witness: Yes.

The Court: Not either joint?

The Witness: Not either joint.

The Court: He had a broken leg. All right. Then what else?

The Witness: The third, fourth, fifth, sixth, seventh, eighth and ninth ribs broken on the right, and a right pneumothorax.

(Testimony of Dr. Lawrence A. Solberg)

The Court: Where were the ribs broken, front or back?

The Witness: They were broken along the back, sort of [246] a diagonal line.

The Court: From the spine?

The Witness: Oh, quite a ways out from the spine; I would say about so far (indicating).

The Court: The witness is indicating about three inches.

The Witness: In a diagonal line.

The Court: Two inches? How many centimeters?

The Witness: Well, it varied. The top ones were out about three inches, three and a half, something like that, and the bottom ones were in closer.

The Court: In closer to the spine?

The Witness: In closer to the spine.

The Court: And what else did you conclude was wrong with him, then?

The Witness: A collapsed lung.

The Court: Right lung?

The Witness: That is right.

The Court: Was it full of blood?

The Witness: Not at that time. Later on we took a picture and it looked as though there had been some bleeding in it.

The Court: Later on?

The Witness: Yes.

The Court: Later? [247]

The Witness: Yes.

The Court: What do you mean by later, the next day or next hour?

(Testimony of Dr. Lawrence A. Solberg)

The Witness: No, no. It was several—it was a couple of weeks after; he developed some trouble in his chest.

The Court: All right. What else?

The Witness: And he had, I think it was, two lacerations at the scalp.

The Court: Did you x-ray his skull?

The Witness: No.

The Court: At no time?

The Witness: At no time. The reason for that—

The Court: Did you make any diagnosis as to whether or not he had any brain injury?

The Witness: Yes, sir. I—He had a cerebral concussion—he had the—I would say—

The Court: But as between a concussion and contusion of the brain, would you say that he had only a concussion?

The Witness: Well, that is pretty hard to say. He had cerebral damage, that he had. I couldn't say whether it was a concussion or a contusion.

Q. By Mr. McKnight: Doctor, at the time, did you not diagnose a condition of skull fracture?

A. Yes, I thought he had a skull fracture.

Q. And why didn't you take x-rays when he first came [248] in?

A. Well, when he first came in, he was in no condition to; we couldn't do anything but put him in an oxygen tent. Then, when he got better, when we had his legs strung up, then, he could not be moved from the room back to the x-ray room, and that was the only machine that we had that could take skull pictures. So when we

(Testimony of Dr. Lawrence A. Solberg)

had his leg fixed up, then the only machine we could take x-rays with was a portable, which would not take satisfactory skull pictures, and by the time he reached the condition where we could take him down and get x-ray films of his skull, it was no longer necessary for the treatment of his condition to have them.

The Court: You mean treatment of the condition of his skull or mental processes?

The Witness: Any—

The Court: Or orientation, or what do you say?

The Witness: Well, there would be nothing gained by taking x-ray pictures of his skull at that time.

The Court: In other words, if there had been any fracture, it would have started healing, is that it?

The Witness: Oh, yes, it would have started healing by that time.

The Court: How long was that?

The Witness: Well, it was 16 weeks before he got down where we could take him and take off the traction. [249]

The Court: You mean to take a picture of his skull?

The Witness: Yes. Outside of taking it with a portable, which we found from experience, it just doesn't take satisfactory x-ray pictures of the skull.

Q. By Mr. McKnight: Assuming that you had taken pictures of his skull and discovered his skull was fractured, would your treatment have been any different than it was? A. No, sir.

Q. It would have been exactly the same?

A. Yes, sir.

(Testimony of Dr. Lawrence A. Solberg)

Q. Then, you did diagnose a cerebral concussion, and according to your diagnosis a skull fracture. Anything else, Doctor?

A. Well, he had abrasions and contusions; let's see (witness examines papers); multiple contusions and abrasions.

The Court: Can you give an opinion of what the diagnosis of concussion which he had was?

The Witness: Oh, I would say it was moderate, moderately severe.

The Court: Moderate to severe?

The Witness: No. I would say moderate concussion. I think most of his unconsciousness, his lack of consciousness, came from his chest difficulty, and he had a moderate cerebral concussion. I don't think it could be classed as severe.

The Court: All right. I interrupted you counsel [250] Excuse me.

Mr. McKnight: Yes, your Honor.

Q. Doctor, what was his condition, what did you observe about his mental condition while he was under your care there?

A. Well, he didn't know where he was. His mind was always back some place along the line of that vacation trip that he had taken. He thought he was in Nevada at one time and he finally got it down as far as, I think, Merced. He never did get to Madera, oh, for a month or six weeks after he got there.

The Court: You mean in talking to you?

The Witness: That is right. I asked him every day, I made a point of it, to see how he was coming along.

(Testimony of Dr. Lawrence A. Solberg)

The Court: Yes.

Q. By Mr. McKnight: Did he seem to recognize people when they came in to see him or not?

A. He did not recognize his mother.

Q. What did he do, can you tell the Court, any peculiar things he did, that would indicate his mental condition?

A. First, he would take down all his traction apparatus every night. He would lower all the ropes and put all his weights on the floor. I don't know how in the world he did it, but they were always down there every morning. I had a [251] nurse to watch and see to be sure that some visitor didn't do it. They went in there and they said his weights were not down this morning. And I went in there and they were all down on the floor again. I asked him why he did it, and he said, "Did what?"

I said, "Lower your weights?"

He said, "I didn't do it." That went on for some days.

Q. When you talked to him about it, did he seem to realize he had done those things?

A. No. He denied it.

Q. How long was he in the hospital altogether?

A. He was in from the 25th of July to the 27th of November.

The Court: Of November?

The Witness: Until November, yes, sir.

Q. By Mr. McKnight: That is over four months?

A. Yes.

(Testimony of Dr. Lawrence A. Solberg)

Q. During that period of time, did he ever appear to you to have any memory at all of the happening of this accident, or anything of that kind?

A. No, sir. He never could recall the accident.

Q. Did you try to talk to him about it?

A. I asked him a few times about the accident, trying to find out just what happened.

Q. He never could remember about it? [252]

A. And he didn't know any more about it than I did.

Q. Doctor, do you still believe that these symptoms are symptoms of a moderate concussion?

A. Yes. I don't think it would be—well, it might be—

The Court: What is the difference between concussion and contusion of the brain, Doctor?

The Witness: Well, contusion means so much damage that there is actual bleeding, that is, gross bleeding in the brain. If you would open it up and cut it, you would see gross bleeding.

And a concussion is the damage which is evident maybe by bleeding, it might be evidence of bleeding; you might not even see it grossly, the evidence of it, but still the damage is done.

Q. By Mr. McKnight: I understood when he first came in there, he was bleeding from the nose?

A. Yes.

Q. Would that indicate possibly contusions?

A. Yes, it could be.

The Court: Was it a basal skull fracture?

The Witness: It would be a fracture in the crest of the ethmoid, which would be basal, yes.

The Court: The cerebellum?

(Testimony of Dr. Lawrence A. Solberg)

The Witness: It would be the basis of the cerebrum up [253] in the front, the frontal lobes.

Q. By Mr. McKnight: Is there any way for you to determine definitely whether this was a brain concussion or a brain contusion? A. No, sir.

Q. Or both? A. There wasn't.

The Court: Is there any way for a skilled person, upon mere observation of the patient, to determine whether or not there is a concussion or a contusion, when there is no outward physical evidence of piercing of the skull?

The Witness: Well, you can in certain types of damage, intracerebral damage, you can determine that it is pretty severe. I mean, you don't—a lot of basal skull fractures you diagnose, you take x-rays, and you still can't see them, but you know they are there; they bleed from the ear or they bleed from the nose, or they get hemorrhages behind the eyes, or they have pupillary changes, or they become unconscious, and their pulse will go up and blood pressure rise. Those are all evidences of cerebral damage.

The Court: Of basal?

The Witness: Well, basal or—

The Court: Other?

The Witness: —other, which is damage to the brain.

Q. By Mr. McKnight: Then, you are not in position to [254] say whether this was a case of contusions or of concussion?

A. I couldn't. I couldn't say positively.

Q. But you did say that in your opinion he did have a skull fracture?

A. I believe he had a skull fracture, yes.

(Testimony of Dr. Lawrence A. Solberg)

Q. Along with whichever, whatever he did have, is that right?

A. That is right. I believe he did have a skull fracture.

Q. How long was his leg in traction?

A. 16 weeks.

Q. 16 weeks. Did this condition of mental confusion, of taking his weights off, not being able to recognize people, that kind of thing, continue all during that period?

A. No, No. He quieted down after a while and was a very good patient?

Q. How long did those acute noticeable things continue?

A. I can't say exactly, but it seems—I know that it was at least a month, that he was doing that, that he was out fully that way, and it might have been six weeks.

Q. But you say he never regained his memory of the things surrounding the accident?

A. Not until he left.

Q. Not until he left there?

A. That is right. [255]

Q. What do they call that condition, where people lose their memory in accident?

A. That would be amnesia.

Q. That is called a—

A. Traumatic amnesia.

Q. Is that an uncommon condition in this type of injury?

A. No, sir; quite common.

Q. From your whole study of Mr. Uarte and all of your knowledge of his condition and your observation, there, do you feel or do you believe that he actually suffered from that condition?

A. Yes.

(Testimony of Dr. Lawrence A. Solberg)

Q. You don't believe that that was put on in any way?

A. No, I don't believe it.

The Court: Is that your opinion?

The Witness: That is my opinion, yes, sir.

Q. By Mr. McKnight: What did you do for him in connection with his chest and his ribs?

A. We strapped them, put a rib belt on at first, but he seemed to get along better without it, so we just kept him on a firm surface in the bed.

Q. Do you remember whether he suffered from any symptoms of head pain, headache, that kind of thing, while he was there at the hospital? [256]

A. I believe he did. I can't remember exactly whether he was—I know he was complaining of this scalp wound all the time.

Q. And what kind of treatment did you give in connection with the fracture of the leg, of the thigh? You said you put him in traction? A. Yes, sir.

Q. Very briefly, what did you do?

A. We put a pin through his tibia, the upper part of his tibia.

Q. Did that require an operation, to do that?

A. A minor one.

Q. An opening and incision, and so on, in the leg?

A. No. You don't make an incision. You just put the wire in, drill it through.

Q. Oh, you put it right through the whole leg?

A. And then you put a traction on that, and string a rope up over some pulleys and hang weights on it until it pulls the leg into line.

Q. And you keep him in that position?

A. And that holds the position and the length.

(Testimony of Dr. Lawrence A. Solberg)

Q. And it is your testimony that he was in that position for about 16 weeks? A. Yes, sir.

Q. After you took him out of traction, what did you do [257] for him with reference to the leg?

A. Well, we got a walking caliper for him.

Q. A what? A. A walking caliper.

Q. Is that a brace? A. Yes, it is.

Q. Made out of what?

A. Made out of iron.

Q. It is made out of iron?

A. Strap iron.

Q. And was he still wearing that when he left the hospital? A. Yes.

Q. When did you last make an examination of Mr. Uarte? A. I saw him yesterday.

Q. Did you examine him at that time?

A. Yes, I did. I looked him over.

Q. Did you take a history from him of the—

A. Well, briefly.

Q. Of how he was getting along, and so forth?

A. Yes.

Q. And talked to him? A. Yes.

Q. Examined his leg and his chest?

A. Yes; fluoroscopes. [258]

Q. What conclusions did you come to?

A. Well, I think he is doing—made a pretty good recovery. He still has some pain in the chest. He has some weakness in the leg.

Q. Let us take the chest. In your opinion, he still had some pain in the chest. What is that a result from?

A. Well, I think probably he has some, although I could not see it on the fluoroscope (I fluoroscoped him

(Testimony of Dr. Lawrence A. Solberg)

yesterday, too), but he is bound to have some residual pleurisy where he had that collapsed lung; that means that the thing, that the lung is punctured, that the pleura was punctured in that area in there, so I imagine that that would be causing the pain, and then, too, the rib cage is a very active organ. It moves constantly with each respiration.

Q. Do you think he will ever completely recover from that condition, or do you think following the period of time that has now elapsed, that he will continue permanently and for the rest of his life to have some difficulty there, some discomfort?

A. Well, I think he will continue to improve, but I believe that he will have pain for a long time, maybe the rest of his life.

Q. What is your opinion of his condition, now, in reference to his leg? [259]

A. Well, there is some—That leg is smaller than the other, and it is weaker; it has good motion in it. The leg, I think, too, will improve more than it has now. It will get better, but he probably will have,—

The Court: You say the leg is smaller?

The Witness: Yes, the muscles are still—they are doing pretty well, but they are still atrophied.

The Court: They are atrophied?

The Witness: Some atrophy, yes.

Q. By Mr. McKnight: Do you believe that that leg will ever be as good as it was before the accident?

A. I don't believe it will probably ever be as good.

Q. You think it will always give him some difficulty and he will experience some weakness in it?

A. Well, that would be—

(Testimony of Dr. Lawrence A. Solberg)

Q. I just want your opinion, Doctor, right or wrong?

A. I think he will—I think it will improve quite a bit more than it has now, but he could very well have pain in it—weakness, probably, all the rest of his life.

Q. About this head injury, is there any way as a doctor to determine what will be the final result of this head injury?

A. No. I think that, too, is just a question of—

The Court: What is that?

The Witness: I think that, too, is just a question of [260] waiting and observation. I don't believe you can say positively, now.

Q. By Mr. McKnight: From your experience with that type of injury, Doctor, do you find in some cases that they recover completely over a period of time, and in other cases, after that period of time and of apparent improvement, then they get worse, is that true?

A. Yes, that is right, they do.

The Court: Well, I do not understand your question. "Recover," recover what, recover his mental faculties or get well?

Mr. McKnight: Well, no.

The Court: Cease to have pain? What are you talking about? You better clarify your question.

Mr. McKnight: Yes.

Q. What history did Mr. Uarte give you? Did he tell you about his present condition in reference to his head?

A. He still has some dizziness and ringing in the ears.

Mr. Deutz: I object to that as hearsay.

Mr. McKnight: Well, history given to a doctor is not hearsay, your Honor.

(Testimony of Dr. Lawrence A. Solberg)

The Court: That is right.

Mr. Deutz: It is a self-serving declaration.

The Court: Objection overruled.

The Witness: He had some dizziness and ringing in the [261] ears.

The Court: The doctor's testimony is ultimately only opinion.

Q. By Mr. McKnight: All right. And did he tell you he had trouble concentrating, some trouble with remembering things, yet?

A. I don't remember that he told me that.

Q. Well, what I meant by my original question is—

A. He could very well have.

Q. What I mean by that is this, Doctor: Is there any normal course that a head injury of this kind always follows? I mean, in other words, if a head injury of this kind begins to show improvement, do you know from that that he is going to get completely well?

A. No, sir. That varies. It varies just like individuals vary with everything else.

Q. Isn't it true that a doctor never knows what may be anticipated from an injury of that kind?

A. That is right.

Q. In the future, regardless of the course that it has taken over a period of a year or two?

A. Yes, that is true.

Mr. McKnight: I think that is all, your Honor.

The Court: Cross examine. The long and short of your last statement is that you are unable to give any prognosis of [262] any future condition or injury?

The Witness: Yes.

(Testimony of Dr. Lawrence A. Solberg)

The Court: Either mental or physical, so far as his head is concerned, or brain?

The Witness: Yes, that is right. I couldn't say positively.

Cross-Examination

By Mr. Deutz:

Q. Now, Doctor, I believe you stated that at the time that this patient, Mr. Uarte, was brought into the hospital, that no x-ray was made of the skull, is that correct?

A. Yes, sir, that is right.

Q. And you determined that there was a skull fracture merely from the general outward appearance and symptomatic appearance of the patient; is that correct?

A. Yes.

Q. And in similar manner, you determined that Mr. Uarte had a concussion or a contusion?

A. That is right.

Q. Now, can't a contusion be a part of a concussion?

A. The two sort of interblend. I mean, it is—you can't—When it comes to a severe concussion, I mean you can't draw a definite line between the two.

Q. Now, Doctor, did you make a spinal puncture of [263] Mr. Uarte? A. No, I didn't.

The Court: What was his answer?

Mr. Deutz: "No."

The Witness: "No."

Q. By Mr. Deutz: Isn't it a fact, Doctor Solberg, that the tapping of the spine for spinal fluid and an examination of that fluid for blood content, for blood content, is one of the best methods of determining whether or not there is a concussion of the brain?

A. When there is brain damage, yes, that is right.

(Testimony of Dr. Lawrence A. Solberg)

Q. But you did not make such a test at this time?

The Court: For concussion or for contusion?

The Witness: For either one. No, I didn't make that.

Q. By Mr. Deutz: Wouldn't it be a normal practice to use that as a means of—

A. Well, if he had been in better condition, I would have.

Q. Was he in such bad condition?

A. You understand that he was in dying condition. I didn't expect—I had to get him in an oxygen tent right now. He was getting blue.

Q. But at no time after he was removed from the oxygen tent was a puncture made of the spinal column?

A. No, sir. [264]

Q. And at no time did you attempt to verify your superficial diagnosis by determining whether or not there was blood in the spinal fluid?

A. No, I didn't.

Q. In the ordinary course of events, wouldn't you use that as a means of verifying findings?

A. No, not unless—I don't do spinal punctures if the patient is doing all right, I don't do it. If they show signs of increased intracranial pressure, then I do spinal puncture.

Q. In this case I believe it was your preliminary diagnosis that there was a skull fracture and probably contusion or concussion? A. Yes.

Q. Wouldn't that conclusion by you be sufficient for you to want to verify it by a spinal puncture?

A. Not unless he showed some signs of increased intracranial pressure.

(Testimony of Dr. Lawrence A. Solberg)

Q. When Mr. Uarte was well enough to be taken to a place where he could have a skull x-ray made, you felt that was no longer necessary?

A. That is right.

Q. Do you mean by that that you felt the mental or brain condition had so improved that further examination in that line was no longer necessary? [265]

A. No—Well, his general condition was so improved that I didn't feel that it was necessary, and it wouldn't add anything to his treatment.

Q. Well, at that time you were no longer worried about whether or not it was actually a skull fracture or not, is that right? A. That is right.

Q. In other words, Mr. Uarte's condition had progressed to such an extent that any worries on that score no longer prompted you to want an x-ray?

A. That is right.

The Court: In other words, if he had a bad skull fracture, he would have been dead by that time?

The Witness: Yes, if he had showed some signs of increased intracranial pressure, in doing the taps—

The Court: So you came to the conclusion—

The Witness: So I came to the conclusion that he had brain damage.

The Court: But whatever brain damage there was, it was healing itself?

The Witness: Well, yes.

Q. By Mr. Deutz: And there were no signs of this intracranial pressure?

A. No. There were no signs at any time of this intracranial pressure. [266]

(Testimony of Dr. Lawrence A. Solberg)

Q. You also stated that sometimes in Mr. Uarte's statements he would talk about portions of his vacation in Nevada, and he then finally got down as far as Merced in his recollections. Do you recall how long after the accident happened, or how long after Mr. Uarte entered in the hospital that he began to have, roughly, memory to the extent of remembering having been at Merced?

A. Well, the Nevada memory was quite early.

Q. How early?

A. It was within the first week.

Q. Within the first week?

A. Yes, and then he went—I felt very elated.

Q. He remembered he had been on a vacation up in Nevada?

A. Yes. He said he was some place in Nevada.

Q. On a vacation?

A. Yes, I believe he said on vacation.

Q. Did he remember who was with him or any of the features of the trip at all?

A. I don't recall any.

Q. You said you followed him and finally got him down to Merced?

A. Yes. One day I went in and asked him where he was and he said, "Merced." Well, I was quite elated, and I thought tomorrow he would be in Madera, tomorrow, and when [267] I came back the next day, he was back in Nevada again.

Q. How long after he was admitted was he talking about Merced?

A. I think that was early. It was along about the end of the second week—

(Testimony of Dr. Lawrence A. Solberg)

Q. The end of the second week?

A. —or beginning with the third week.

Q. Do you recall an instance when Mr. Walter Chandler of the District Attorney's office in Madera and a Mrs. Maude Cook came up to examine Mr. Uarte or to ask him a few questions? A. Yes.

Q. Did they have your permission at that time?

A. Wait a minute, now.

Q. He was your patient.

A. That was when he was in the hospital—

Q. Yes, that was on August 5, 1946, to be exact.

A. I don't remember it.

Q. That was 10 or 12 days after the accident.

A. I don't remember, but I suppose they had my permission.

Q. You don't recall specifically?

A. I don't recall specifically.

Q. Whether they were there? A. No. [268]

Q. Would your notes give you some indication of what Mr. Uarte's condition was on August 5, 1946?

A. (Witness examines papers.) The only note I have there was that—a nurse's note, which says, "Seems more rational. He had a good night."

The Court: What does "a good night" mean?

The Witness: Oh, well, that is a sort of routine statement they make when the patient doesn't give them too much trouble, I think. I mean, he doesn't exact—well, just a good night.

The Court: It means better than the previous night, is that it?

The Witness: Well, yes, yes; they make that remark, they either put "a good night" or "bad night," depending

(Testimony of Dr. Lawrence A. Solberg)

on how he went through the night, whether he was comfortable or uncomfortable, whether he slept or did not sleep.

Q. By Mr. Deutz: Will you tell me how long after the time Mr. Uarte was admitted to the hospital he was actually unconscious?

A. He was actually totally unconscious only that—I was talking to him the next day, but he couldn't—I mean he could talk to you, but it didn't make sense. He became unconscious when he was on the x-ray table.

Q. He was conscious before that?

A. When he first came in, he wasn't exactly conscious. [269]

The Court: When you say "unconscious," what do you mean?

The Witness: Comatose.

The Court: Comatose; he hasn't any senses?

The Witness: That is right.

Q. By Mr. Deutz: He was not comatose when he was brought in?

A. No. He was irrational, kind of wild. As I say, he resisted us putting him from the Gurney onto the x-ray table, and he did not want anybody to touch him any place, and he would push you away, but while we were examining him, he became quieter and finally became comatose.

Q. How long did that comatose condition last?

A. Well, he was still in it when I went home that night, and the next morning he was out of it.

Q. Would your records show—

A. I don't believe so.

(Testimony of Dr. Lawrence A. Solberg)

Q. —when he appeared to come out of that?

A. I don't know. Here on the 26th is a note, "Conscious at times." Well, that was the day I was talking to him.

Q. Does that state the hour?

A. Yes, I note it was made at—

The Court: When you say "unconscious," Doctor, let me understand that completely. Do you mean that a person then [270] gives no evidence at all of having any of their senses in operation except breathing?

The Witness: That is right, your Honor. He is out like a light.

The Court: You mean when a person is out like a light? Is that what you mean?

The Witness: That is what I mean.

The Court: I understand that.

Q. By Mr. Deutz: Did you give us the hour on that other?

A. It was around noon. I haven't got it exactly.

Q. Around noon on the 26th? A. Yes.

Q. Was that the 26th? A. The 26th.

Q. Or was that the 25th? A. The 26th.

Q. You remember this happened to be the morning of the 25th, at midnight? You went home that night?

A. No. This note is dated the 26th here. He came in that 25th.

Q. At 12:00 a. m.

A. Then we took care of him that night and he was unconscious. He was out and I went home. The next day I came back. [271]

Q. That was still the 25th?

A. I guess that was the same day.

(Testimony of Dr. Lawrence A. Solberg)

Q. You went home at what time, in the morning?

A. That is right. I don't recall exactly.

Q. But this was 12:15 a. m.?

A. He came in at 12:15 a. m. We took care of him. We were there for about an hour. I imagine it was about 2:00 o'clock when we went home.

Q. Then, when you came back the next time—

A. Then, when I came back the next time, we talked to him.

Q. That was on the 25th, the same day?

A. That is right; that is the same day.

Q. Now, I would like to ask you one last question, and that is this? So far as you know from your actual examinations of Mr. Uarte, is this correct: That you cannot now definitely state that you are definitely sure that Mr. Uarte actually had a skull fracture, a concussion or a contusion of the brain; can you state that unequivocally?

A. Well, no; those things you can't state unequivocally.

Q. In other words, there were no tests, none of them, more or less concrete medical tests, given that would definitely establish any one of those conditions?

A. Well, the only thing is your clinical?

The Court: You said he had brain damage? [272]

The Witness: That is right.

The Court: Definitely?

The Witness: Yes, I would say definitely, he had brain damage.

The Court: You can't classify whether it was contusion or concussion?

The Witness: No, I don't know.

(Testimony of Dr. Lawrence A. Solberg)

The Court: Or basal fracture?

The Witness: No.

The Court: Frontal, cerebellum, or cerebrum?

The Witness: No. I couldn't localize it.

Redirect Examination

By Mr. McKnight:

Q. Doctor Solberg, just to clear up one thing: You say you would talk to him and on one day he would say he was in Nevada and the next day or at another time he would say he was in Merced?

A. Well, that is just once, he said he was in Merced.

Q. Then the next time you talked to him, he said—

A. One time he was at Oakland and another time I think he was even down there at Los Angeles, once.

Q. You mean by that he thought he was in those places when you were talking to him?

A. Yes. You would go in in there and you would think [273] he looked perfectly well, and ask him how he felt. He would tell you he felt good or he would tell you he hurt some place. Then you would ask him if he knew where he was, what town this was. He would look at you and say, "Oh, I think Las Vegas," or some place over there.,

Q. In other words, he was relating to you where he had been on his vacation, he thought he was in those places at that time?

A. That is right; he thought he was there.

Q. And he was actually in Madera?

A. That is right.

Q. And then, the next time he would be some place else; if you talked to him one day and then talked to him

(Testimony of Dr. Lawrence A. Solberg)

the next day, would he appear to remember what he had told you the day before? A. No, sir.

Q. About where he was, about anything?

A. Not about where he was. I don't remember any particular thing excepting that.

The Court: He would complain?

The Witness: Yes, he would complain of his pain.

The Court: Doctor, is that common, where somebody has this amnesia, to be able to describe their pains and things that happened to them during their period of amnesia but not to remember anything else? [274]

The Witness: I don't know what you mean. Pardon me. That pain—

The Court: Well, if a person had amnesia and you knew that they had amnesia, would that person be able to relate to you that he had cut his finger an hour ago?

The Witness: No, but he could tell you if he had pain.

The Court: He could tell you if he had pain?

The Witness: At the time.

The Court: At the time?

The Witness: You would ask him if this or that hurt, then, yes or no.

The Court: But he wouldn't be able to remember where he did it?

The Witness: No.

The Court: Or how?

The Witness: No.

The Court: All right.

Mr. McKnight: That is all, Doctor.

Mr. Deutz: Just a moment. That is all.

Mr. McKnight: May the Doctor be excused, Your Honor?

(Testimony of Dr. Lawrence A. Solberg)

The Court: No. I think probably—I see Dr. Ceroni here. It looks like he is going to testify for the government, and maybe the doctor better wait here until the government gets through.

Mr. McKnight: May I ask the doctor a question about [275] leaving word where we could get you, Doctor?

The Witness: Well, they don't know exactly what you know.

The Court: Is this a message?

The Bailiff: Yes. Here is a message for him to call 297 Madera as soon as you finish.

The Court: Take him into chambers and let him use the telephone there.

Mr. Deutz: Your Honor, I might suggest that Dr. Ceroni informs me that he has nothing to add to the testimony, so I have no desire to call him.

The Witness: I have a woman that is about to have a baby, and she is in labor up there.

The Court: I did not understand: Do you have a baby?

The Witness: No. A woman in labor. She has been in labor all day.

Mr. Deutz: I don't intend to call Dr. Ceroni. He informs me he has nothing to add to this testimony.

The Court: You have no medical testimony? The doctor can be excused. Mr. Welch, the bailiff here, will take you in chambers and you can immediately telephone that woman.

The Witness: Thank you.

(Testimony of Dr. Lawrence A. Solberg)

Mr. McKnight: Let the record show, if your Honor please, that the doctor had in Court with him all of his x-rays. [276]

Mr. Deutz: I did not hear that, your Honor.

The Court: He said let the record show he had in Court with him all of his x-rays. I don't know whether they were all. He had a bundle of x-rays.

Mr. Deutz: Well, the x-rays are not introduced into evidence.

The Court: I know. Counsel, do you know that they are his x-rays?

Mr. McKnight: Yes, your Honor. That is what he told me.

Mr. Deutz: I will stipulate he had x-rays with him.

The Court: All right.

Mr. McKnight: And they have been previously submitted to Dr. Ceroni.

The Court: They have been previously submitted to Dr. Ceroni?

Mr. McKnight: Yes, your Honor.

Mr. Deutz: We will so stipulate.

The Court: Do you want to excuse the doctor, now?

Mr. McKnight: Yes.

The Court: Do you rest?

Mr. McKnight: Yes, your Honor.

The Court: I mean finally rest?

Mr. McKnight: Yes, your Honor.

The Court: Call your witnesses. [277]

Mr. Deutz: Very well. I will call Lieutenant Becker.

ALEX T. BECKER,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name.

The Witness: Alex T. Becker.

The Clerk: What is your address?

The Witness: 144 Saipan Road, San Francisco.

Mr. Deutz: May I have the photographs, your Honor?

The Court: I am sorry. You can have them all.

What are your arrangements for getting back to San Francisco? I take it you want to go tonight?

The Witness: I have my own car.

The Court: Do you have other personnel with you from the Navy?

The Witness: I have a Chief there that is with me, and the other two gentlemen came in their own car. We both have cars.

The Court: Very well. So you don't have to make any deadline on the train?

The Witness: That is right.

The Court: So we can relax and let you testify, then.

The Witness: All right. [278]

Direct Examination

By Mr. Deutz:

Q. You are a commissioned officer in the United States Navy? A. That is correct.

Q. On or about July 24, 1946, or shortly thereafter, were you called upon to make an investigation or examination of any of the vehicles involved in the accident that has been under discussion in this trial?

(Testimony of Alex T. Becker)

The Court: Any of the what?

Mr. Deutz: Any of the vehicles.

A. No. Not on that particular date, because I was returning off of leave the following day.

Q. By Mr. Deutz: Well, at a date subsequent thereto, were you assigned the duty of examining any of these vehicles?

A. Well, no. It was another officer who is now in civilian life. He is in the courtroom. He was assigned as an investigator with the Chief.

Q. Did you have occasion to examine the Golden State Peterbilt tractor-trailer unit that is under discussion here at this time?

A. That is correct. I investigated that there on the 31st day of that month, when we returned to Oakland.

Q. And where was that unit at that time?

A. It was over there in their repair garage where they [279] store all their vehicles.

Q. And you went over and examined that vehicle at that time?

A. That is correct.

Q. Could you tell us what you found in the way of injuries or damage to that vehicle?

A. I found that the radiator on the right-hand side was pushed in about two and a half feet, just on the left side, up against the engine itself.

The Court: What is that, on the right side two and a half feet against the left side? I don't follow you.

The Witness: No. Against the engine. The radiator on the right-hand side was pushed two and a half feet up against the engine.

The Court: Oh, I misunderstood a word.

(Testimony of Alex T. Becker)

The Witness: And the right fender was also pushed up about a foot and a half, and the bumper on the right-hand side, that was pushed in also about a foot or more and had the concave in the center of the bumper itself as though one impact hit it first and another one on the end of the bumper and towards that right front wheel, and the spring was also—the shackle on the spring was broken. It was laying on the ground. And also the U-bolt on the frame, that held the axle to the frame, that was sheared off.

The Court: That is your business in the Navy; I mean [280] mechanical equipment?

The Witness: Yes. I am an engineering officer, a motor man.

The Court: Assigned to motor vehicles?

The Witness: We have 34 of them assigned to our recruiting district.

Mr. Deutz: Very well.

The Witness: And the runningboard on the right-hand side, that was also sheared off, including the battery that was on that side, that was—part of that battery was missing, and it was shattered; and the headlight, that was also broken and pushed in considerably.

And that is about the only thing that I can recollect was wrong with that.

Mr. Deutz: This was all on the tractor.

The Court: The tractor?

The Witness: That is what they call it.

Mr. Deutz: The tractor, that is the motor unit.

(Testimony of Alex T. Becker)

Q. Now, did you find any injuries to the side of the semi-, the semi-trailer?

A. Well, on that little trailer that they have behind the semi, I saw approximately a foot or a little less above the wheels, in other words, the bottom of this particular semi, there is a line there that could run about a foot long.

Q. This was on the semi itself? [281]

A. Yes, that is right—No; the trailer.

The Court: Wait a minute. That was on the trailer.

Mr. Deutz: There are two trailers.

The Court: You have three units.

The Witness: The semi, and then you have the trailer.

The Court: The semi is the big body of the tractor?

The Witness: Yes.

The Court: And the trailer was on the end unit?

The Witness: Yes.

The Court: And what you are describing now was on the trailer?

The Witness: That is right.

Mr. Deutz: The end unit, the third unit.

The Court: The third unit.

Mr. Deutz: All right.

Q. Did you notice any damage on the second or middle unit?

A. Well, not that I recollect, at that time; I was looking more for damage to the tractor itself, because I didn't think there was any damage to the semi or the trailer at all. They seemed to be intact, and, in fact, I couldn't—I didn't see them over there. They were gone.

Mr. Deutz: I see.

The Witness: But I did,—

(Testimony of Alex T. Becker)

Q. By Mr. Deutz: Now, Lieutenant Becker, I show you [282] Plaintiff's Exhibit No. 8, and I will ask you—

Mr. McKnight: Let me see which one that is. Thank you. Go ahead.

Q. By Mr. Deutz (continuing): I will ask you if that is a true representation of the injury to the front end of that vehicle, as best you could determine?

The Court: "That vehicle"?

Mr. Deutz: The vehicle being the truck.

The Court: The truck.

Mr. Deutz: The truck and trailer unit, this in particular being the tractor.

The Court: Well, let us call it the truck.

The Witness: That is what I observed over there, although I had a better view, because I was right up on top of it and one of the wheels was completely off when it was out there in Oakland.

The Court: One of the wheels was off?

The Witness: They had it off.

The Court: Oh, they had taken it off?

The Witness: Yes, because the hub was bent.

Q. By Mr. Deutz: You spoke of injury to the trailer. I show you Plaintiff's Exhibit No. 10 and I will ask you if that is the injury?

The Court: That is the picture of the semi-trailer? [283]

Mr. Deutz: Yes, that is the picture of the semi-trailer.

Mr. McKnight: I understood the witness to say that he didn't see the semi-trailer.

The Court: He said it wasn't there.

The Witness: No.

(Testimony of Alex T. Becker)

Mr. Deutz: I would like to refresh the witness' memory, by showing him this photograph and asking him whether the identical—

The Court: That certainly would not be permissible, but go ahead.

Q. By Mr. Deutz (continuing): Whether the markings that you have seen on that vehicle were the markings you have just described?

A. Those are the markings I observed all right.

The Court: You wish to correct your testimony now to say that it was on the semi-trailer and not the trailer?

The Witness: That is right, because there was a little confusion because the picture is a little small.

The Court: All right.

Mr. Deutz: That is all.

Cross-Examination

By Mr. McKnight:

Q. Will you explain just one thing so that I will [284] understand it? You say they weren't there and you didn't see them, Lieutenant. Then, how could you identify the photograph?

A. Well, I identify the photograph from the picture that I saw on the—let's see, about a week after we received them over at the station.

Q. Oh, you identify this picture from another picture that someone showed you, is that right?

A. No. These are the originals that came from—

Q. But you didn't see the semi-trailer or the trailer?

A. No, I didn't.

Mr. McKnight: I move that testimony be stricken out for the purposes of the record, then, your Honor, if he did not see them.

(Testimony of Alex T. Becker)

The Court: It is his testimony. I can believe it or not believe it. It all goes to the weight of his testimony and not to whether it is admissible. If it is not admissible, you strike it out, and if it is admissible, you leave it in.

Mr. McKnight: That is right.

The Court: And it is admissible.

Redirect Examination

By Mr. Deutz:

Q. Now, Lieutenant Becker, did you examine this semi-trailer and trailer, with reference to which you gave me a [285] few minutes ago your recollection, was that of your own observation, or did you obtain that only from the photograph? A. The photograph.

Mr. Deutz: Very well.

The Court: You may step down, Lieutenant. And call the next witness.

Mr. Deutz: Chief Burgess.

WILLIAM EDWARD BURGESS,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William Edward Burgess.

The Clerk: And your address?

The Witness: Home address?

The Court: No.

The Witness: 98 Golden Gate Avenue, San Francisco.

The Court: What is your first name?

The Witness: William.

(Testimony of William Edward Burgess)

The Court: William Burgess?

The Witness: Right, sir.

Mr. Deutz: Will you bear with me for just a moment, your Honor?

The Court: What is this, a new set of photographs? [286]

Mr. Deutz: I have some. Yes, this is a new set.

The Court: Well, just show them to counsel here so that we save time. While you are showing him all those pictures, we will have a recess.

Mr. Deutz: Very well.

(Whereupon, a short recess was taken.)

Mr. Duetz: Take the stand again, Mr. Burgess.

Direct Examination

By Mr. Deutz:

Q. Now, Mr. Burgess, you are a member of the United States Navy, is that correct? A. I am.

Q. And what is your rating?

A. Chief Machinist's Mate.

Q. And where are you assigned?

A. United States Navy Recruiting Station, 98 Golden Gate Avenue, San Francisco.

Mr. Deutz: I think we will have to go just a little slower.

The Witness: All right.

Mr. Deutz: We have a reporter taking everything down.

Q. Now, Chief Burgess, were you assigned to a duty somewhere shortly subsequent to July 24, 1946, to investigate the circumstances surrounding an accident at mader, [287] California?

A. Did you say before?

(Testimony of William Edward Burgess)

Q. Shortly after July 24, 1946.

The Court: Subsequent.

A. Yes, I was.

Q. By Mr. Deutz: And on what date did you go to Madera?

A. I went up to San Francisco at approximately 11:00 o'clock.

Q. On what day? A. On the 25th.

Q. That was the day after the accident?

A. The day after.

Q. And when you arrived at Madera, did you have occasion to examine any of the vehicles involved in the accident? A. I did.

Q. And which vehicle did you examine?

A. Both vehicles.

Q. Both vehicles?

The Court: Both?

The Witness: The station wagon and the private party sedan.

Q. By Mr. Deutz: Where were those vehicles at the time you examined them?

A. The name of the garage I do not know. [288]

Q. Were they both in the same garage?

A. Both in the same garage, behind a gate.

Q. Now, calling your attention to the 1941 Ford V-8 deluxe four-door sedan, Mr. Uarte's car, you made an examination of that vehicle? A. I did.

Q. Now, do you recall what you found in the way of damage to that vehicle? A. Well—

The Court: Have you got some notes?

The Witness: Well, I can pretty well describe it, sir.

(Testimony of William Edward Burgess)

The Court: All right. If you have notes and need them, you can refresh your memory.

The Witness: I have none.

The Court: Providing you let counsel see them.

The Witness: The front of the sedan, both sides, the front of the sedan by the left and right fender and front grille was in pretty bad shape, was pushed back, and if I remember correctly, the wheels toed in. The right front tire was flat, and the front right—the front left door was open and could not be closed; it was beyond the catch, the safety catch, that stops the door from going so far.

And the left rear of the sedan, if I remember correctly, the small window was cracked and there was scrapings on that side, and the fender was pushed in against the car. [289]

All the tires, in my opinion, were what I would call smooth tires, with tread on the side, the tread perhaps showing an imprint of tread but still what I would consider smooth. One tire lying in front of the car was smooth. That tire evidently was on the left rear and it was also flat.

Mr. Deutz: Just a moment, Mr. Burgess.

The Witness: Yes.

The Court: Do you have a series of pictures?

Mr. Deutz: Yes, I have, your Honor.

The Court: Have the Clerk mark them for identification. I guess you start with A.

The Clerk: Yes, your Honor.

The Court: How many do you have?

Mr. Deutz: There must be about six or seven.

The Clerk: One to seven.

(Testimony of William Edward Burgess)

The Court: A, B, C, D, E, F, and G.

The Clerk: Do you want that marked A?

Mr. Deutz: Yes.

Mr. McKnight: Your Honor, would it save time if we just stipulate that they all be—if counsel desires them in evidence, if we stipulate that they all be introduced in evidence and we can just use them as we see fit, rather than take the time to identify each one.

The Court: They are admitted in evidence. [290]

Mr. Deutz: Very well.

(The photographs referred to were marked Defendant's Exhibits A to G, inclusive, and received in evidence.)

Q. By Mr. Deutz: Now, Mr. Burgess, I show you Defendant's Exhibit A in evidence and ask you if that photograph represents a front or head-on view of the 1941 Ford sedan? A. It does.

The Court: On—

Q. By Mr. Deutz: On the date on which you made the examination?

The Court: July?

Mr. Deutz: July 25, 1946.

The Court: The 25th or 26th?

Mr. Deutz: Well, let's see:

Q. Was it the 25th, Mr. Burgess, or the 26th?

A. I could not be sure. It was 4:30 in the evening when we arrived in Madera, and whether it was light enough to still take those pictures, I don't remember.

The Court: It was either day?

Q. By Mr. Deutz: It was one day or the other, is that correct?

A. The 25th or 26th. Yes.

(Testimony of William Edward Burgess)

Mr. Deutz: Just a moment. You were speaking of a tire [291] which was lying in front of the car and it had been removed from the right—I mean, from one of the rear wheels?

Mr. McKnight: Just a moment. To which we object.

The Court: A conclusion of the witness. It is stricken from the record.

Which you had been advised had been removed from one of the rear wheels? Did you see it removed?

The Witness: No, sir.

The Court: All right, it is stricken.

Q. By Mr. Deutz: Is that the tire of which you spoke? A. That is right.

Q. The tire which is shown in that photograph?

A. That is it.

Q. And is that tire in the approximate condition that you noticed the tires of that vehicle?

A. That is right.

The Court: Let me see it.

Q. By Mr. Deutz: Mr. Burgess, you spoke a moment ago about certain damage to the Ford sedan. I show you Plaintiff's Exhibit No. 3 and ask you whether that represents an accurate picturization of the left side of the Ford sedan? A. Yes.

Q. I call your attention to the damage to the left rear fender of that vehicle and ask you whether that was the [292] damage you have just described?

A. Yes. I mentioned pushed in.

Q. Now, Mr. Burgess, did you notice any paint marks on the fenders of that vehicle foreign to the color of the car itself? A. On the 25th or 26th, yes.

(Testimony of William Edward Burgess)

Q. And what was the color that you found on that fender?

A. Cream, I guess. In other words, it shows here but it doesn't show too clearly in my pictures, like a sideswipe.

Q. In other words, it was a smear of paint substance on that fender foreign to the natural color of that car?

A. Yes.

Q. And it was impregnated in the wreckage of that fender?

A. Yes, it smeared, I mean under, what I mean, paint rubbing together, friction caused it, the blending.

Q. I see. Now, do you have anything to add to a further description of the damage to that vehicle?

A. No, I do not think so. No, nothing.

Q. But you found some flat tires on this car?

A. Well, the one in front.

Q. The right front one was flat?

A. The right front was flat and the one lying in front [293] of the vehicle was flat.

Q. Now, Mr. Burgess, did you make an examination of the government station wagon involved in this accident?

A. I did.

Q. I show you government's, Defendant's Exhibit B.

Mr. McKnight: May I see which one it is?

Mr. Deutz: Surely. All right.

Mr. McKnight: B and A. Thank you.

Q. By Mr. Deutz (continuing): Will you—I will ask you, in your examination of the government vehicle, the Ford station wagon, does that photograph adequately portray and accurately portray the appearance of that vehicle from the front? A. Yes, it does.

(Testimony of William Edward Burgess)

Q. And I will show you government's, Defendant's Exhibit F, and I will ask you whether that photograph accurately portrays the damage to the government station wagon as shown from an angle from the right front of that vehicle? A. Yes.

Q. Now, more specifically, Mr. Burgess, do you recall the general character of damage to this vehicle, would you be able to describe it?

A. Of the government station wagon?

Q. That is the station wagon.

A. I itemized that, and very closely, part for part. [294] It would be hard for me to do that from memory, but I can give you a general description, in taking it from the left front side and on around, as I did, crawling underneath of it and going through it.

Q. Well, let us take that left front side.

A. The left front side—

Q. Or let us take the left side generally.

A. The left side: The headlight was intact and the left front fender was not scratched. The running board was intact. The window operates up and down and on that left front door is not cracked or broken. The same applies to the rear. In the left rear door, the window would roll up and down, and was not cracked. Of course, closing was impossible. It closed on an angle.

The left rear fender is in a buckled shape, the body being pushed back.

The Court: Buckled?

The Witness: Buckled, yes. The rear body of the tailgate is busted. One of the seats, I believe it was the back seat, was completely missing, and the back tail light

(Testimony of William Edward Burgess)

was cracked. The top was torn open and the top itself was torn all the way off.

Q. By Mr. Deutz: Was there any damage on the left side of this vehicle to indicate an impact at that particular side of the vehicle? [295]

A. None whatsoever. Impact possibly by rolling over, yes.

Q. But, was there anything to indicate that there might have been any sideswiping of that vehicle?

A. There was no sign of paint, of another color of paint blending there, or there wasn't any scratch marks, particularly on the left side, left front fender.

Q. Would you give me what the general nature of the damage was to the rest of the vehicle? First of all, what was the condition of the tires?

A. The front tires were both new. I know that, because I sent them down there just after the vehicle came down.

The Court: Well, from what you saw on the car.

The Witness: The tires were in very good condition.

The Court: Neither of them were collapsed?

The Witness: No. They were all inflated at the time.

Q. By Mr. Deutz: All four tires were inflated?

A. All four tires were inflated, yes, all four tires inflated, the spare also; the spare intact.

Q. Just give us a general run-down as to the rest of the damage upon that vehicle.

A. The block, it says cracked loose from the body of the car; twisted the radiator. Half of it was intact and [296] sagged and blended, and the other half is still lying in the field, I suppose. The driver's seat, it says,

(Testimony of William Edward Burgess)

was twisted, and the steering wheel was bent. The frame no doubt is out of line. The spring bent. Generally, a total loss, I would say.

Mr. Deutz: That is all.

Cross-Examination

By Mr. McKnight:

Q. What color was the station wagon?

A. The station wagon had three colors. The fenders were 1-2-3 gray, that is the Navy gray, 1-2-3 Navy specification.

Q. You would not know what that means?

A. Well, that is gray, such as your shirt.

Q. Something like my shirt?

A. Right, perhaps a little lighter.

Q. And do you know what the coating underneath that is? A. The undercoat of the vehicle?

Q. Yes.

A. Occasionally a brand of red, but mainly black after a steam cleaner brings out the black.

Q. And then what other color was there on the station wagon except this gray? [297]

A. The two other colors. Of course, the top is black, that is the canvas top, and then the woodwork on the vehicle, all the outstanding parts are white, bleached white, and the other is a shellac or a varnish, rather, varnish on the part where the sign is, on the protruding numbers, "U. S. Navy," and so forth, that is in black and brown, light brown.

Q. What part of it is bleached white?

(Testimony of William Edward Burgess)

A. Such as the door, these stripes here, the frame, say, the frames of the door.

Q. The bleached white, is that pure white or like a cream?

A. Like an egg shaped white—I mean an egg yolk, white, kind of yellowish.

Q. That is a yellowish white, and that was part of the trim on the station wagon?

A. That was part of the trim on the station wagon.

Mr. McKnight: That is all.

Redirect Examination

By Mr. Deutz:

Q. Mr. Burgess, this egg yolk white you were just speaking of a moment ago on the frame, could that in your opinion have been the cream colored paint that you have previously described on the left rear fender? [298]

Mr. McKnight: To which we object as calling expressly for the opinion of a witness on a matter not within the realm of expert testimony—

The Witness: No.

Mr. Deutz: Just a moment.

Mr. McKnight: —and asking for the opinion and conclusion of the witness.

The Court: Well, anything could be, counsel. The objection is sustained.

Mr. Deutz: Very well.

Q. Mr. Burgess, you previously described a paint smear. A. Yes.

Q. On the left rear fender of that car.

A. That is on what?

(Testimony of William Edward Burgess)

Q. On the left rear fender of the—Wait a minute. Now, I am getting confused.

The Court: We have had confusing evidence today.

Mr. McKnight: Sir?

Mr. Deutz: I would like to ask this question: On the left rear fender of the Ford sedan you found some cream colored paint?

The Witness: Yes.

Q. By Mr. Deutz: A smear?

A. A streak. [299]

Q. A streak. Now, in your opinion, was the cream colored paint on that Ford sedan identical with the egg yolk, I believe it was egg yolk, colored paint you found on the frame of the Navy station wagon?

A. When I refer to paint on the Navy station wagon, I mean varnish or shellac. That is not paint.

Q. And the egg yolk color that you just referred to was the varnish or shellac and not a metallic paint on the body?

A. Of the station wagon?

Q. Yes. A. That is right.

Mr. Deutz: That is all I want.

Re-Cross Examination

By Mr. McKnight:

Q. When you speak of a yellowish white, it is practically the same color as a cream, isn't it? Cream is a yellowish white, isn't it?

A. Well, that is the bleach of the white; that is, shellac or varnish over some will bring out the wood. Varnish is transparent.

(Testimony of William Edward Burgess)

The Court: Did you make any chemical analysis or microscopic study of any of this paint that you speak of, of any of its particles, to determine whether or not it [300] was shellac, varnish or paint?

The Witness: I did not scrape any off.

The Court: Very well. You are not the man who examined the truck?

The Witness: No, sir.

The Court: Do you know how high above the surface of the ground the top of the station wagon was, at the hood?

The Witness: I beg your pardon?

The Court: Do you know how far above the surface of the ground, that is, the bottom of the car—

The Witness: Yes.

The Court: —the top of the station wagon was at the hood, at the beginning of the hood?

The Witness: Approximately two and a half to three foot.

The Court: Did you measure it, or have you ever measured them?

The Witness: No, sir, I never have measured them.

The Court: You never have. Do you know how far above the surface of the ground, that is, the surface of the pavement, the bottom of the body of the semi-trailer was?

The Witness: I took that into consideration.

The Court: Do you know how high it was?

The Witness: No, sir. It is higher than—it is higher than a hood.

(Testimony of William Edward Burgess)

The Court: You don't know how high it was? [301]

The Witness: No, sir.

The Court: You don't know how high. Did the other witness measure that?

Mr. Deutz: I don't believe he did. You can ask him.

The Court: Well, ask him here.

Lieutenant Becker, do you know what I am talking about?

Mr. Becker: Yes, sir.

The Court: I am talking about from the surface of the pavement to the bottom of the truck.

Mr. Becker: That is right. I did not measure it.

The Court: Did you measure the station wagon?

Mr. Becker: No, sir.

The Court: All right.

Redirect Examination

By Mr. Deutz:

Q. Mr. Burgess, when you spoke of the top of the hood of the station wagon being about two and a half to three feet above the ground, did you refer to that in its damaged condition, or in its natural condition?

A. Natural condition.

Mr. Deutz: That is all.

Mr. McKnight: That is all.

The Court: Call the next witness. [302]

Mr. Deutz: Mr. Segren. Mr. Segren, would you wait for a moment, please?

All right, Mr. Segren. Go ahead.

PETER G. SEGREN,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: And your full name?

The Witness: Peter G. Segren, 709 Gary, San Francisco.

Direct Examination

By Mr. Duetz:

Q. Mr. Segren, on or about July 24, 1946, were you a member of the United States Naval forces?

A. I was.

Q. And what was your rank at that time?

A. Lieutenant.

Q. And where were you assigned to duty at that time?

A. The Navy Recruiting Station, 98 Golden Gate, San Francisco, California.

Q. Lieutenant Segren, do you recall the happening of an accident at or near Madera, California, on July 24, 1946?

A. I do.

Q. Were you assigned as an investigating officer [303] covering that accident?

A. I was.

Q. Did you go to Madera to further that investigation?

A. I did.

Q. Upon your arrival at Madera, did you have occasion to examine the two Ford vehicles, the station wagon and the Ford sedan at Madera?

A. I did.

Q. Do you recall where that examination took place?

A. It was at a Chevrolet garage and yard alongside of it.

(Testimony of Peter G. Segren)

Q. Now, Mr. Segren, you have heard Mr. Burgess testify as to the damage, as to those two vehicles, is that correct? A. I did.

Q. After hearing the testimony of Mr. Burgess, would you in testifying on the same damage to those vehicles vary your testimony in any way?

A. The only thing was that all the tires on the Ford sedan were smooth.

Q. They were all smooth? A. All smooth.

Q. Now, I would like to ask you this: Did you have occasion to notice the left rear fender of the Ford sedan?

A. I did. [304]

Q. And on the left rear fender of that Ford sedan, did you notice any paint marks foreign to the color of the sedan itself? A. Not on the fender.

Q. Not on the fender? A. No, sir.

Q. Did you notice them on any part of the body of that car?

A. It was on the body above the fender I noticed a mark.

Q. Above the fender. Was that above or below or on the level with the rear window of that sedan?

The Court: Well, here is a picture of it. There are so many pictures here, it is like playing solitaire.

Mr. Duetz: Here we are.

The Court: Here we are.

Q. By Mr. Duetz: I show you Plaintiff's Exhibit 3, and ask you whether that is the left side of the Ford sedan, as you recall it? A. It is.

(Testimony of Peter G. Segren)

The Court: Oh, it has been testified that that was taken at the time of the accident. Now, will you indicate on that picture where you saw what you are talking about now?

The Witness: I saw a crease up here (indicating). [305]

The Court: Did you measure that above the ground?

The Witness: No, I didn't.

The Court: Did you measure the truck body above the ground?

The Witness: No, I didn't. I never saw the truck.

The Court: You never saw the truck?

The Witness: No, sir.

Q. By Mr. Deutz: How far from the upper extremity of that automobile did you notice that crease?

The Court: How far from the upper extremity?

Mr. Deutz: Yes, from the top, how far down from the top?

A. I would estimate it was about two and a half feet from the top.

The Court: Two and a half feet from what?

The Witness: From here to here (indicating on photograph).

Mr. Deutz: Oh, that is on an angle; that is two and a half feet from the—

The Court: Well, taking the extreme top, carrying toward the rear at right angles and measuring down.

Mr. Deutz: That is about on a 45-degree angle.

The Witness: It was two and a half feet from the door jamb of the rear door.

(Testimony of Peter G. Segren)

Q. By Mr. Deutz: Is that correct? This is the door [306] jamb of the rear door, right at this point (indicating)? A. Yes.

Q. Now, the top juncture of that was at about two and a half feet down on an angle, where you found the indentation—where you found the foreign paint marks, is that right? A. That is right.

Q. What was the color of those paint marks?

A. They were a cream color.

Q. They were a cream color. Did you see the Golden State truck while you were there? A. I did not.

Mr. Deutz: That is all.

Cross-Examination

By Mr. McKnight:

Q. And you saw none of that cream colored paint below the position that you have shown his Honor upon the picture there, where that crease is?

A. No, I didn't.

Q. And you were examining it and looking at it and discussing it with these other Navy men at the time, were you not? A. That is right.

Q. So you have a pretty definite memory of it, don't [307] you? A. I have.

Mr. McKnight: That is all.

Redirect Examination

By Mr. Deutz:

Q. Mr. Segren, in your examining of the station wagon, could you tell whether there was any paint of the color similar to that you saw on the Ford sedan, that cream colored paint, at any portion of the—Let me rephrase that question. Strike that question, please.

(Testimony of Peter G. Segren)

Was the cream colored paint that you found above the left rear fender of the Ford sedan similar to any portion of the painted color of the Ford station wagon?

A. Not to my knowledge.

Q. Was it similar to any of the natural colors with which that Ford station wagon was painted?

A. Not to my knowledge.

Mr. Deutz: That is all.

Re-Cross Examination

By Mr. McKnight:

Q. Wasn't there a yellowish white trim on the station wagon?

A. No, sir. The only trim was woodwork being [308] varnished.

Q. You say none of the trim was a yellowish white on the station wagon, is that your testimony?

A. That is my testimony.

Mr. McKnight: That is all.

The Court: The woodwork, was it natural color and the varnish was colorless?

The Witness: Yes, sir.

The Court: So that if the varnish left anything, it would be colorless?

The Witness: That is right.

The Court: All right. You may step down. The next witness.

Mr. Deutz: Mr. Northridge.

EDWARD NORTHRIDGE,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Edward Northridge.

The Clerk: And your address?

The Witness: 615 Gonzalez Drive, San Francisco. [309]

Direct Examination

By Mr. Deutz:

Q. Mr. Northridge, on July 24, 1946, were you a member of the Naval forces of the United States?

A. I was.

Q. And where were you stationed?

A. I was officer in charge of the San Francisco Recruiting District, which comprises the northern part of California.

Q. And does that include the Fresno area?

A. It does.

Q. What was your rank at that time?

A. Lieutenant, U. S. Navy.

Q. Were you assigned to investigate an accident that occurred at Madera on or about July 24, 1946?

A. Well, I assigned Lieutenant Segren to investigate it.

Q. Did you accompany Lieutenant Segren to Madera to make the investigation?

A. I followed him about four hours later.

(Testimony of Edward Northridge)

Q. While you were at Madera, did you have occasion to examine the Ford station wagon and the Ford sedan involved in this accident?

A. I did. I believe it was on the 26th of July.

Q. When you made your examination? [310]

A. And it was jointly made with Lieutenant Segren, Mr. Burgess and Sergeant Gill, sir, at the time.

Q. Did you examine the tires of the Ford sedan at that time? A. I did.

Q. And what was their condition?

A. They were smooth. There was little tread on the edges, but the center of the tires were smooth.

Q. And were some of those tires deflated?

A. Yes. There was one lying in front of the Ford sedan, and I believe the left rear tire was deflated.

The Court: On the car?

The Witness: I don't believe that it was on the car at the time.

The Court: It may be stricken.

The Witness: I think that was the one lying there.

The Court: Well, you didn't see it taken off?

The Witness: I did not see it taken off, no, sir.

Q. By Mr. Deutz: Did you notice the right front tire of that vehicle?

The Court: You saw a tire lying there?

The Witness: The right front tire was deflated.

Q. By Mr. Deutz: It was flat?

A. It was flat. The left front tire was inflated.

Q. I see. [311]

A. And the right rear tire was inflated. The left rear tire was not on the Ford sedan.

(Testimony of Edward Northridge)

Q. All right. Now, on the Ford sedan, calling your attention to—Let me see that picture again.

The Court: That picture.

Q. By Mr. Deutz (continuing): —Plaintiff's Exhibit 3, which is a view, I believe, at the left side of the Ford sedan. Did that left side of the Ford sedan so appear to you at the time of your examination?

A. Yes.

Q. I call your attention to the left rear fender of that Ford sedan and to its damaged condition, and I would like to ask you whether on examination of the left rear fender or any parts adjacent thereto you discovered any color of paint foreign to the natural color of that vehicle?

A. Yes. There was a streak of cream colored paint, I believe, just at the point where it seems creased in this picture.

Q. Would you identify that with just a little cross?

A. There was a streak of cream colored paint in through there (indicating).

The Court: Right back of the rear window.

The Witness: And also there was a—not a streak, but apparently irregular blotches of cream colored paint practically on this left top corner of the Ford sedan. I believe [312] there were two or three.

Q. By Mr. Deutz: Now, that was just behind and above the last rear window on the left side of the vehicle?

A. That is right.

Q. And there were also paint marks below that?

A. That is right.

Q. Below that window?

A. There were.

(Testimony of Edward Northridge)

The Court: Did you make any examination of the Ford station wagon, at any time, to see whether or not there was any paint—

The Witness: I did.

The Court: —or blotches or streaks or marks or remnants?

The Witness: I did. I took particular notice.

The Court (continuing): Foreign to the original and natural paint of the car?

The Witness: I did.

The Court: Where?

The Witness: This was at the parking—You are talking about the Ford station wagon?

The Court: I am talking about the Ford station wagon.

The Witness: I examined all the windows—I mean, I examined the fenders.

The Court: Did you examine the hood? [313]

The Witness: The hood was up.

The Court: Did you examine it?

The Witness: I examined the hood, not too carefully, perhaps.

The Court: But not for paint marks?

The Witness: I didn't notice any paint marks.

The Court: Did you examine it for paint marks?

The Witness: I was looking for paint marks, but I noticed none.

The Court: And you noticed none. Did you examine the radiator?

The Witness: Of the station wagon?

(Testimony of Edward Northridge)

The Court: Of the station wagon or any portion of the right side of the car?

The Witness: I believe we spent about—

The Court: For paint marks?

The Witness: For paint marks; I was looking for paint marks, but I noticed none on the right-hand side of the Ford station wagon.

The Court: Did you notice some on the left?

The Witness: No. The left front fender was practically intact.

The Court: Well, you didn't notice any?

The Witness: I noticed none on the fender.

The Court: Did you notice some green paint marks on [314] the fender?

The Witness: No, I didn't. I was looking for green paint.

The Court: You were looking for green. You weren't looking for cream?

The Witness: Both.

The Court: Both, but you didn't see any?

The Witness: No, I would say not.

The Court: Would you say there wasn't any?

The Witness: I didn't notice any.

The Court: You wouldn't say there wasn't any?

The Witness: There may have been some.

Q. By Mr. Deutz: To the best of your knowledge, after a thorough examination of the station wagon, you didn't find any foreign color at any part thereon?

A. I found none. Pardon me. My investigation and inspection was not too thorough. It was confined to about a half hour period.

(Testimony of Edward Northridge)

Q. But you spent a half hour examining that vehicle?

The Court: He just answered that.

Mr. Deutz: All right.

Q. Now, you have heard the testimony of Mr. Burgess here in Court? A. Yes, sir, I have.

Q. After hearing his testimony, would you vary the [315] testimony in any way from that which was given by Mr. Burgess, in regard to the damage to the two vehicles involved here; in other words, would your testimony be the same?

A. Why, except as to the height of the hood.

Q. Yes, but I mean in other respects.

A. In other respects, it would be the same.

The Court: How high is the top of the hood of the station wagon?

The Witness: I did not measure it.

The Court: Well, did you ever measure one?

The Witness: I did not measure it, but I can approximate it.

The Court: Well, I know approximately, too, but you never measured it?

The Witness: That is right.

The Court: Did you measure the bottom of the bed of the tractor—You never saw it?

The Witness: There was no opportunity to see it.

The Court: Thank you. Any questions?

Mr. McKnight: No, your Honor, no questions.

The Court: All right. You may step down.

Mr. McKnight: Could I ask Mr. Segren a question? Could I recall him—

The Court: Surely. [316]

Mr. McKnight: —for further cross examination?

PETER G. SEGREN,

called as a witness by and on behalf of the Defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Re-Cross Examination (Continued)

By Mr. McKnight:

Q. Mr. Segren,—May I have this photograph that we have used so consistently?

The Court: That is No. what?

Mr. McKnight: 3, your Honor.

The Court: 3.

Q. By Mr. McKnight: Mr. Segren, I understood you to say that the only place that you saw this cream colored paint in your examination was in this crease right here (indicating on photograph)?

A. That is right.

Mr. McKnight: Counsel, do you mind if I make a pencil arrow pointing to the crease so the record will show the crease that he is speaking about?

Mr. Deutz: I have no objection. I think we should have started out, however, with the other testimony—

Mr. McKnight: Well, if you have no objection, I will [317] do it so that the record will show the crease that the witness pointed to, your Honor, and you watch me, Mr. Witness, so I get it right.

The Court: Let the witness do it.

Mr. McKnight: All right.

(Testimony of Peter G. Segren)

The Court: And it will be his testimony and not yours.

Q. By Mr. McKnight: You will make the arrow point to the crease that you had in mind.

(The witness places an inked marking on Plaintiff's Exhibit No. 3.)

Mr. McKnight: Now, instead of making an arrow pointing to it, you have outlined it in ink.

The Witness: Yes, sir.

Q. By Mr. McKnight: The crease itself?

A. That is right.

Mr. McKnight: Let me see if I can get this thing put on here. No. It is on there. That is all. Let me show this to your Honor so you will know what we are talking about.

The Court: I know what you are talking about.

Mr. Deutz: Would you like to mark that photograph according to the testimony of the others, or shall I recall the other witnesses to the stand?

Mr. McKnight: I am only interested in doing what I did.

Mr. Deutz: All right: I will recall Mr. Burgess. [318]

Come back to the stand, please. We will get them all marked in here while we are at it.

WILLIAM EDWARD BURGESS,

recalled as a witness by and on behalf of the Defendant, having been previously duly sworn, was examined and testified further as follows:

The Court: Well, you better get some other kind of mark, then.

Mr. McKnight: I was going to suggest that, your Honor, that he put another mark on it.

The Court: Have you got some pink ink?

Mr. Deutz: I am afraid not. What have you?

Mr. Reid: Purple ink.

Mr. Deutz: We have three of them.

Direct Examination

By Mr. Deutz:

Q. Will you mark on here the white spots that you observed,—the white spots right at the top there?

The Court: And when you do that, draw a little line over to the right of the picture and mark it with your initials, will you?

Mr. Deutz: In purple. Go ahead. [319]

The Witness: I will initial it, your Honor.

The Court: You indicate the spot you are talking about.

The Witness: Yes.

The Court: And then you draw a line over and just put your initials there.

The Witness: You want the crease?

Mr. Deutz: We want the white paint marks, the cream paint marks.

The Court: Now, which do you mean, white paint marks or cream paint marks?

Mr. Deutz: Cream paint marks.

(Testimony of William Edward Burgess)

The Court: Or varnish paint marks?

Mr. Deutz: We want the cream paint marks.

The Court: All right.

The Witness: These are the paint marks. (The witness draws an inked line on Plaintiff's Exhibit 3.)

Q. By Mr. Deutz: Just put your initials on there. (Witness complies.)

Q. I will ask you this question, Mr. Burgess, in relation to the testimony as to the station wagon in this case. I believe you testified that there was some egg yolk colored varnish on it.

The Court: Did you testify it was egg yolk colored varnish or egg yolk colored paint? [320]

The Witness: That is the color of the wood. Varnish is transparent; that shows through. If varnish comes off on anything, you don't see anything but peelings.

The Court: You don't see anything—Did you see peelings?

The Witness: No, sir.

The Court: You saw egg yolk color?

The Witness: No, sir, I didn't see any egg yolk color. I was describing the wood frame of the station wagon. It is bleached in white or egg yolk white.

Q. By Mr. Deutz: That is the natural color of the wood?

A. That is the natural color of the wood, and to protect that against weather, it is shellacked, stained and varnished.

The Court: You did not find any of those colors on this car?

The Witness: No, sir. You would have to find wood chips.

The Court: Do you want to cross examine Mr. Northridge?

Mr. McKnight: No, your Honor. It is all right, I mean very well covered.

Mr. Deutz: Will you take the stand, please? [321]

EDWARD NORTHRIDGE,

recalled as a witness by and on behalf of the Defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination (Continued)

By Mr. Deutz:

Q. Now, Mr. Northridge, I will ask you to identify the—

The Court: What color have you for him?

Mr. Deutz: Cream.

The Court: No, I mean ink?

Mr. Deutz: Well, we are going to have to use the purple again.

Mr. McKnight: I suppose we could use a pencil.

Mr. Deutz: It won't work on that slick surface.

Mr. McKnight: Let's see. Yes, it will.

Mr. Deutz: All right, try a pencil.

The Court: I want some mark on it that the Circuit Court will be sure to read.

Q. By Mr. Deutz: I want you to mark on there so that it will indicate where you found cream colored paint on the plaintiff's vehicle?

A. As I mentioned before, there were splotches up in this particular corner, up here (indicating on Plaintiff's [322] Exhibit 3).

(Testimony of Edward Northridge)

Q. This is the approximately location of the X which has just been made there by Mr. Burgess?

A. That is right. There were some cream colored splotches, irregular shaped.

Q. Will you just put a couple of X's there, then?

A. It was dented.

The Court: You can just draw a line, if it was the same spot, draw a line over to it and put your initials there.

Mr. Deutz: That isn't showing, I am afraid.

The Witness: I have a solid black ink here.

Mr. Deutz: All right. Draw a circle, where you found that spot.

The Witness: Just around that area there (indicating).

The Court: Draw a line over to the right and put your initials there. That is where you saw the cream colored splotches?

The Witness: Cream colored splotches there.

Mr. Deutz: And for the record, that circle happens to circle the X just previously made by Mr. Burgess.

Mr. McKnight: By Mr. Burgess.

Q. By Mr. Deutz: Will you point out where you found any other splotches on that paint?

A. To the best of my recollection, there may have been [323] possibly more than one streak here where I just noticed the major streak. What that was above here, I would not be sure. I think that streak ran somewhere like that (indicating on Plaintiff's Exhibit 3).

The Court: Draw a line, now.

Mr. Deutz: Draw a line.

(Testimony of Edward Northridge)

The Court: And put a figure "2" after your initials.
(Witness complies.)

The Court: That is it. And what color was that?

The Witness: Cream color.

The Court: Cream color, the same color as the other one?

The Witness: The same color as the other one.

Mr. Deutz: That is all.

The Court: All right. The next witness.

Mr. Deutz: Mrs. Cook.

MAUDE COOK,

recalled as a witness by and on behalf of the Defendant, having been previously duly sworn, was examined and testified further as follows:

The Court: You were sworn in this afternoon. You have changed your dress?

The Witness: I did.

The Court: Your name is Maude Cook, is that right? [324]

The Witness: That is right.

Direct Examination

By Mr. Deutz:

Q. Mrs. Cook, this afternoon you testified that on August 5, 1946, in the morning of that day, you interviewed, in the presence of Mr. Walter Chandler, Mr. Ernest Uarte, the plaintiff in this case, at the Dearborn Hospital, Madera, California; is that correct?

A. Yes.

(Testimony of Maude Cook)

Q. At that time I asked you this afternoon certain questions as to Mr. Uarte's condition. Now, in your report or in your statement that you took at that time, I believe there were some questions asked by Mr. Chandler as to the general background of Mr. Uarte, specifically he asked him his name, address, and so forth.

I would like to have you read to me—First of all, I will ask you, that statement that you have there, was that statement taken down by you at the time of the interview in question? A. Yes.

Q. It was taken down in shorthand?

A. In shorthand.

Q. Was it transcribed by you? A. Yes. [325]

Q. And it is true and correct? A. Yes.

The Court: Do you have any objection to this whole statement going in?

Mr. McKnight: Not at all.

The Court: All right. Put it in evidence. Have you got it transcribed there?

The Witness: Yes. This is the only copy that I have.

The Court: Well, you can probably get it back, the whole thing.

Mr. Deutz: I would just like to have about one page read from that.

Mr. McKnight: I think the whole statement should be in evidence if any part of it is in evidence, and I would have to ask her to read it all if we didn't do it this way, your Honor.

The Court: Just take out his statement there, tear it out. You still have your shorthand notes?

(Testimony of Maude Cook)

The Witness: I still have my shorthand notes, yes.

The Court: Now, that which you have handed to counsel, let us mark it here as Government's Exhibit H, and it is a true and correct transcription of true and correct shorthand notes that you took of the statements made by Mr. Uarte, the plaintiff, on the time and occasion that you have just [326] mentioned?

The Witness: Yes.

Q. By Mr. Deutz: Now, Mrs. Cook, you have already stated that this statement is a true and correct copy of the statement given to you orally by Mr. Uarte on that particular date? A. Yes.

Q. That is, August 5, 1946? A. Yes.

Q. In the presence of Mr. Chandler? A. Yes.

Mr. Deutz: Now, your Honor, I would like to read just short portions of this into the record. They are very short.

The Court: You can put those all in evidence and you can use that in argument. Have you any more questions to ask her?

Mr. Deutz: No. I think that will be all.

(The statement referred to was marked Defendant's Exhibit H, and was received in evidence.)

The Court: Do you want to ask her any questions?

Mr. McKnight: No, your Honor.

The Court: Oh, by the way, where was Uarte then?

The Witness: He was in bed in the Dearborn Hospital.

The Court: What was his condition that you observed?

The Witness: When I walked in, he was awake. [327]

(Testimony of Maude Cook)

The Court: He was awake?

The Witness: And we talked to him.

The Court: Did he have any apparatus on?

The Witness: Yes, I believe he had some sort of
a cast or something.

The Court: A derrick?

The Witness: A derrick, yes.

The Court: Or something like that.

The Witness: As I remember it, he did.

The Court: Bandages?

The Witness: I believe so. It seems to me his
face was all bruised.

The Court: His face was bandaged?

The Witness: I don't remember the bandages.

The Court: Bruised?

The Witness: Bruised.

The Court: Did he have bandages that you noticed
on the chest?

The Witness: I didn't notice.

The Court: Or anything else?

The Witness: I didn't notice that.

The Court: Did you ask him if he wanted to talk,
or somebody else?

The Witness: Well, we were informed that he was
able to talk, and we just went in and started to talk
to him, and [328] he talked to us in a coherent manner.

Q. By Mr. Deutz: Did Mr. Uarte promptly reply
to your questions? A. Yes, he did.

Q. And Mr. Uarte seemed to understand the import
of your questions?

Mr. McKnight: To which we object. It calls for
a conclusion of the witness.

(Testimony of Maude Cook)

The Court: It calls for a conclusion. Is there any cross examination of this witness?

Mr. McKnight: No, your Honor.

The Court: All right. You may go home and change your dress again.

The Witness: Thank you, your Honor. I will do that.

Mr. Deutz: Mr. Chandler.

Mr. McKnight: If there is any question about this statement, it seems to me clear in the evidence the conditions under which it was taken. It is in evidence without objection.

The Court: All right. Let him call his witness. It is his case. Let him try it. [329]

WALTER CHANDLER,

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: And your full name?

The Witness: Walter Chandler.

The Clerk: And your address?

The Witness: 219 South "D" Street, Madera, California.

Direct Examination

By Mr. Deutz:

Q. Mr. Chandler, what is your occupation?

A. Attorney at law.

Q. And on July 24, 1946, was that your occupation?

A. Yes. I was Deputy District Attorney of the County of Madera, at that time.

(Testimony of Walter Chandler)

Q. Now, Mr. Chandler, you had occasion to take certain testimony on the night of July 24, 1946, at the scene of this accident in question?

A. If you are referring to this Uarte accident, yes, sir.

Q. Yes, sir; that is right. Now, on August 5, 1946, did you go to—

The Court: What do you expect to prove by this witness? This is just a corroboration? [330]

Mr. Deutz: Just impeachment testimony here.

The Court: Just corroboration of the fact he was there, he took the witness' statement and he made this statement and the other statements that have been used?

Mr. Deutz: That is right, and that he elicited certain statements from Mr. Uarte at that time.

The Court: Other than what is already in evidence?

Mr. Deutz: They are in evidence in the form of this document, your Honor.

The Court: Yes.

Mr. Deutz: They have been previously testified to by him and by this document I would like to prove, and I can prove by this document, that at that time Mr. Uarte, despite a lapse of memory, did recall who he was, where he lived, what his family relations were, and where he was employed, which was something he could not testify to today.

The Court: It is in the statement, is it not?

Mr. Deutz: Yes, that is correct.

The Court: Why take up time?

Mr. Deutz: Very well. It is just corroborative.

The Court: It is there.

Mr. Deutz: That is all, Mr. Chandler.

(Testimony of Walter Chandler)

The Witness: Very well, sir.

The Court: The statement is in evidence.

Mr. Deutz: Yes, sir. [331]

The Court: By the way, I would like to ask the witness a question. You may answer it there, Mr. Chandler.

The Witness: Yes, sir. Thank you, sir.

The Court: According to this statement, you stated, "It might be well to swear you in as a witness, as far as the Navy is concerned." Were you then attached to the Navy?

The Witness: No, sir. At that time the matter had been investigated diligently by Navy officers, various Navy officers, who did come down there and had been there at Madera for several days following the accident, but during all of that time they were unable, so far as I knew, to obtain an interview with this witness, and they had requested me to obtain any statement that I might be able to obtain and to provide that information for them.

The Court: Well, your purpose in interviewing him was to secure the statement for the Navy?

The Witness: No, sir.

The Court: Or was it to secure his statement in connection with your public duties?

The Witness: That is correct, sir. It was only incidental.

The Court: All right.

The Witness: I thought that possibly they might wish the statement sworn to and we had that power.

The Court: All right. All right, your next witness [332]

Mr. Deutz: The defendant rests, your Honor.

The Court: Is there any rebuttal?

Mr. McKnight: There might be one or two witnesses. May I glance at this statement, your Honor?

The Court: Oh, sure.

Mr. McKnight: I call Mr. Layana.

The Court: You were sworn before: You may take the stand.

CEFERNEO LAYANA,

recalled as a witness by and on behalf of the Plaintiff, in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. McKnight:

Q. Mr. Layana, after you woke up and saw these lights in front of you and the vehicle in which you were riding collided with that vehicle in front of you, do you have any memory—Or, I will withdraw that.

To your knowledge, was there any subsequent collision between the vehicle that you were riding in and any other vehicle, was there another crash after that, that you have any memory of?

A. No. There was just the big crash. Then there [333] was a little bit of a one when we come to a stop.

Q. That was when you struck the car in which the colored people were riding? A. That is right.

Q. You remember no crash in between there?

A. I don't remember there.

(Testimony of Ceferneo Layana)

Q. Did you see this automobile in which you were riding within the next two or three days there at the garage?

A. Yes; we went over there on the following day.

Q. Did you see the damage on the left rear corner of that vehicle? A. Yes, I did.

Q. Do you remember seeing any cream colored paint at that damaged portion?

A. That is one thing I never noticed.

Q. You didn't notice it.

Mr. McKnight: That is all. That is all.

The Court: Do you wish to cross examine?

Mr. Deutz: Just a moment, please. That is all.

Mr. McKnight: That is all, Mr. Layana. No other witnesses, your Honor.

The Court: The plaintiff rests?

Mr. McKnight: The plaintiff rests.

The Court: All right. Do you want to argue it?

Mr. McKnight: Yes. We will wish to argue it. [334]

Mr. Deutz: Yes.

Mr. McKnight: Does your Honor wish the argument tonight? It is perfectly all right with me.

The Court: Well, I have all these things spread out here now. I know what they are all about. I don't know how long it would take me to get them spread out again after Mr. Reid gets through trying two jury cases tomorrow or the next day.

Mr. Deutz: At this time I would like to renew the motion previously made.

The Court: Very well.

Mr. Deutz: Do you wish argument on the motion?

The Court: Make your motion. I just want to get a picture I can look at here. I thought I knew where they were. I will find it. Are they all up here, Mr. Clerk, the pictures?

Mr. Deutz: With the exception of the sketch, I believe they are, your Honor. I think you have them all.

The Court: No. There is another picture. Make your motion.

Mr. McKnight: May I make a suggestion, your Honor, and counsel. We have this map here which will require taking photographs of.

The Court: It wasn't used.

Mr. McKnight: It wasn't used in any way, shape or form. [335] That is Plaintiff's Exhibit No. 1. I wonder if I might have the privilege of withdrawing it as an exhibit so as to keep the record straight. It won't be necessary to use it.

Mr. Deutz: We will so stipulate.

The Court: Very well; it is withdrawn.

(The map referred to, previously marked Plaintiff's Exhibit No. 1 for identification, was withdrawn.)

Mr. Deutz: I would like to move that this action by the plaintiff against the United States be dismissed with prejudice, on the ground that there has been no showing of negligence on the part of the defendant or its employees. There has been only one contention upon which the plaintiff has established liability and that was merely a statement which Mr. McCoy himself had indicated was inadvertent.

The Court: No. The plaintiff hasn't made his contentions yet. I don't know what his contentions will be.

Mr. Deutz: Well, taking any contention, and no contentions have definitely been made, it is the position of the government that there is not one iota of evidence here to actually establish that the government vehicle was negligent in any manner whatsoever.

There is no definite evidence that the government vehicle ever came in contact with the vehicle of the plaintiff, and without such contact, there is absolutely no way by which negligence could be established as far as the government is [336] concerned.

The Court: No. With that latter portion, I don't quite agree, unless there is absolutely—oh, you are speaking of contact?

Mr. Deutz: That is right, your Honor. There is no showing of any—

The Court: Well, I don't know. I have heard that argued many times, but I think—

Mr. Deutz: The only eye-witness has stated—

The Court: —from my experience in life and practical experience in driving automobiles, you might show that there might be no contact at all between automobiles, and still they might be at fault, because how many times have you and I been driving home, for instance, and the fourth car ahead, some lady has decided to turn left suddenly and held out her hand, and there is an accident—it is her ultimate fault. She is the approximate cause of the accident, but you have to pay the bill for bumping into the back end of the fellow in front of you who has the third car back of her.

Mr. Deutz: Your Honor, there is not one speck of evidence in this case that the government car was any-

thing except the second car in the procession coming down upon the highway.

There is no evidence that the government car was ever abreast of Mr. Uarte's car. [337]

There was the testimony of Mr. McCoy that the first car was the car that swerved and was the car that hit his vehicle. That first car has been identified as Mr. Uarte's vehicle. As the government's car was following or trailing Mr. Uarte's car, regardless of what he may have done, as long as he was behind Mr. Uarte, as long as he did not come in contact with Mr. Uarte and do something to injure him, at no time was he in position to impede the progress of Mr. Uarte's car or to endanger it or to do any act which might cause Mr. Uarte alarm.

All the evidence shows that the Navy vehicle was following Mr. Uarte, was never abreast or ahead of that vehicle. That is the reason I stress the point of contact, because that is the only possible way in which the Navy vehicle could have jeopardized the position of Mr. Uarte, would be by contact, because it was never ahead, it was never in front or an obstacle to Mr. Uarte's car at any time.

The Court: No. That isn't the only way, counsel, that he might have jeopardized it. A person who is driving an automobile and using all diligence and care, even using not just ordinary care but the utmost care in approaching an oncoming vehicle, if someone might attempt to pass them—

Mr. Deutz: There is no evidence to that extent in this case, your Honor.

The Court: There is testimony from which one might [338] infer, but if someone might attempt to pass them without any contact at all, the person driving the

car, in order to avoid an accident, in order to permit the car which is attempting to pass to consummate the passage before a head-on collision, may suddenly put his brakes on—

Mr. Deutz: Yes, your Honor—

The Court: —in order to prevent that. So you can't say that that is the only way,—

Mr. Deutz: No, your Honor, but—

The Court: —that an accident can happen.

Mr. Deutz: —such an exception—

The Court: Of course, there was the suggestion that maybe the Navy car clipped them on the rear end or clipped them on the front end.

Mr. Deutz: Such an exception might be worthy of consideration, your Honor, had there been any evidence of the fact that the Navy vehicle was at any time abreast of Mr. Uarte's vehicle or had there been any evidence of any damage to Mr. Uarte's vehicle having been made by a clipping or a side-swiping or any contact between the Navy vehicle and the Uarte vehicle.

Now, there is no such evidence in the record. There is no evidence in the record here to indicate that—

The Court: It all depends on the way you look at it. You mean the way you look at it, there isn't any. [339]

Mr. Deutz: The plaintiff put on his case and put on no evidence whatsoever as to the damage of the various vehicles, as to their character. The government has put on certain evidence in that regard, and I believe there was nothing in the government's evidence that would leave any inference that there had been any contact by side-swiping.

There was direct evidence by the government that the damage was caused by the hit on the front or side of the

Golden State truck, and from the physical evidence and the chart, which your Honor has seen, which, I think, is Exhibit 13, it is quite obvious that the government car never left the southbound lane on that highway.

The Court: Never left it?

Mr. Deutz: Never left it.

The Court: Well, counsel, on this exhibit here, I would like to have you explain to me—This is No. 6, this is a picture taken looking south the way this car was traveling, considering it in connection with the picture at the back end of the trailer and the position of these automobiles and the fact that the hood of this station wagon is up, then, and it flies right around from where it might have hit this.

In other words, nobody knows what happens in these accidents, they are so fast, and you say that it never left a lane of traffic. It looks to me like it just hit that [340] truck, hit it on its side here and went clear around it, and skidded under the semi-trailer part, which pulled that hood right up, and there it sits.

Mr. Deutz: Skidded under the trailer, your Honor?

The Court: With the wheel under. You see, the hood is up in the air like that.

Mr. Deutz: Yes.

The Court: Something pulled that back.

Mr. Deutz: That is right.

The Court: It looks to me like it just got under the corner of that semi-trailer there.

Mr. Deutz: That is quite possible, that is quite possible.

The Court: It may be so. Not that that is any evidence that the government is at fault, but it would seem

to me that it would refute the proposition that this station wagon never left this south lane of traffic. It seems very improbable to me, too, it being a light station wagon compared to a 55,000-pound truck which did leave the lane of traffic which it was going in and found itself crosswise and over on the other side of the road, and did leave it, but a light automobile like that did not leave it.

Mr. Deutz: I would like to point this out, if your Honor please: If you notice the photostats there of Mr. Deming's drawings made at the scene of the accident, you [341] will notice that the station wagon lies some distance north of the position in which the Golden State truck is jack-knifed across the highway. Now, if that vehicle at any time had been south of that jack-knifed truck, I think it would be fairly obvious that it could never have gotten around that enormous vehicle parked, planted right across the highway.

The Court: I do not think there is any doubt but what that station wagon hit this truck head-on, on the nose. The Naval officer's testimony was that there were two evidences here of impacts, one of them was right in the middle, which you see—

Mr. Deutz: That is right.

The Court: —here (indicating), and the other one sheared off the right front wheel and on around the side. Now, it seems pretty impractical to me that it could have been the station wagon that only did this to the truck and hit it, only hit it here in the middle, and still could have so completely demolished the station wagon and so slightly demolished it compared with the Ford sedan. It seems to me the Ford sedan hit one of them and bounced around.

Mr. Deutz: And bounced—

The Court: And the other came along, hit it, and it sort of sheared it off, and they were going so fast I don't think they could have stopped. [342]

Mr. Deutz: I think it is quite obvious that the station wagon hit that right front fender of the Golden State vehicle, but it is also quite obvious from Mr. McCoy's testimony that the Uarte car skidded across the highway first, that that car hit somewhere on the front end of the Golden State truck. It is also quite obvious from the—

The Court: I wasn't very much impressed with the variety of Mr. McCoy's testimony. I don't think he knew which car came across there and hit him first.

Mr. Deutz: Well, the physical situation, I believe, your Honor, would tend to show that it would have to be the Uarte car.

The Court: I can't say that.

Mr. Deutz: For the simple reason that this other car—

The Court: I don't think he knew which car came across there. He saw those lights and they all merged together, and the next thing he saw was a car.

Mr. Deutz: Well, regardless of that, your Honor—

The Court: He was up in the air. He tried to grab his wheel. He was worried about the car coming. He was worried about his truck. He was worried about the "boss," and that was his wife sitting beside him, and I think his testimony is completely unreliable as to what he saw, which car it was.

Mr. Deutz: Well, regardless of what Mr. McCoy actually [343] saw, we do know this: That the Uarte car got past the Golden State truck, in other words, it was south of the Golden State truck, so it went by.

The Court: That is right.

Mr. Deutz: And after Mr. McCoy jack-knifed his truck, nothing could have passed him in that lane of traffic, and the station wagon did not pass him, for the simple reason that when Mr. McCoy—

The Court: No. I think he passed him before. As a matter of fact, I wouldn't be surprised but what it wasn't the station wagon that got out of line and came along and smacked him, then.

Mr. Deutz: If that were so, your Honor, then how would the station wagon get back north of the Golden State truck which is jack-knifed?

The Court: The only way I can answer that is that I tried another accident case one time, where a lady was sitting alone in her automobile; she was struck by another car; her car went to the corner of the curb and came to rest against a telephone post and she was found dead under the car and both doors were locked. Now, nobody can explain it. This happened too fast, but I think I can see how this might have happened, that the station wagon was going so fast that it hit this car and the truck, whirled around and went around. The skid marks here are inapplicable unless they were made by [344] the truck or were made by the station wagon. So I think the station wagon came around and whirled around there.

Mr. Deutz: Which skid marks?

The Court: All the skid marks.

Mr. Deutz: The skid marks on this Exhibit 13 are here on the outside of the highway.

The Court: That is right, and the station wagon had to get on the outside of the highway.

Mr. Deutz: And that is the position, if you will notice on the first page of Exhibit 13, is the position where the truck and trailer came to rest, and in both instances it is the skid marks of the truck and trailer.

The Court: Not precisely.

Mr. Deutz: Which are directly opposite of the railroad signal, which you will notice as a white block.

The Court: Yes, I notice that.

Mr. Deutz: The position of the truck on this map is directly opposite the railroad signal, and on the second diagram—

The Court: Do you think the truck went off here and skidded around?

Mr. Deutz: That is, the truck came to rest right where the skid marks are.

The Court: Not where the skid marks are, but on the pavement opposite the skid marks. [345]

Mr. Deutz: That is right. On this diagram, where the skid marks are, in this position (indicating) and here (indicating), they are exactly at the position where the truck came to rest, as illustrated in the diagram here, so that truck came to rest there. So, regardless of the credibility of Mr. McCoy's testimony, whether he is to be believed or not, he did state this much, that I believe is quite clear, that after the first vehicle clipped him or hit him, his car jack-knifed, his truck jack-knifed. When that truck jack-knifed, it became a very thorough obstacle to any other traffic.

The Court: No; his testimony was that the wheel—

Mr. Deutz: The wheels spun.

The Court: —the wheel spun and it was like that (illustrating) between them—

Mr. Deutz: Yes.

The Court: In other words, it was so close between.

Mr. Deutz: Yes.

The Court: I have heard all the evidence here and I suppose that anybody could argue from now on.

Mr. Deutz: May I point out one thing with regard to those collisions?

The Court: Yes.

Mr. Deutz: He gave us two impacts, one or two—

The Court: Yes. [346]

Mr. Deutz: —and then later, on cross examination, he stated that there were more than two.

The Court: A third one.

Mr. Deutz: Yes.

The Court: Which you were developing, I anticipate, to indicate that somebody hit the back end of that truck.

Mr. Deutz: No, your Honor. I was developing this: I was developing that, as Mr. McCoy testified, Mr. Uarte's car skidded to the right-hand side of the highway; I am speaking of in Mr. McCoy's position, as Mr. McCoy faced north, Mr. Uarte's car skidded all the way over to his right, it started quite a while back, he said quite a ways back, and then across the road again, at which time he came in contact with his vehicle, it hit the right front of that vehicle.

Now, four men have been on the stand and testified that upon the left rear of Mr. Uarte's vehicle there was cream colored paint, and I think it is quite obvious—

The Court: How could that get on the left rear, when Mr. McCoy said the truck was going this way (indicating), and it skidded across the highway?

Mr. Deutz: That is right.

The Court: Now, did it come around this way (indicating), and hit that way and wind up down here (indicating)?

Mr. Deutz: No. Your Honor, I believe that can be [347] explained. May I have a piece of chalk?

You have this truck and trailer coming in this direction—No. It will be in the opposite direction. (Counsel draws on blackboard.) You have the truck and trailer, if you take Mr. McCoy's statement, which was in this position right here (indicating). Mr. Uarte's car swerved across here (indicating).

I will go back a little further. It swerved across—

The Court: Straight across. No. Straighter than that, according to this diagram.

Mr. Deutz: Straight across?

The Court: Yes.

Mr. Deutz: And it came over onto the shoulder.

The Court: Yes.

Mr. Deutz: And it was headed back at the time of the impact.

The Court: Yes.

Mr. Deutz: Now, having the vehicle hit here (indicating), at the point of impact, your vehicle is in that position (indicating on blackboard).

The Court: All right.

Mr. Deutz: On the impact of that vehicle, we have testimony that on this rear fender there was yellow paint or cream paint.

The Court: Yes. [348]

Mr. Deutz: I believe it should appear from that, that after the striking of the front of this vehicle, upon the right side of this Golden State truck, this car swerved. Remember, this was a wet, slippery road. This car swerved and it came flat against the side of the Golden State truck. That is where the cream colored paint came in on the side of Mr. Uarte's vehicle, when the vehicle swung around and hit at this point.

The Court: No, he wouldn't have done that, counsel, because if that vehicle of 55,000 pounds had swung around—

Mr. Deutz: This wasn't the truck.

The Court: I know, but if it swung around against it, headed north, then, as you have it, with its 55,000 pounds of weight—

Mr. Deutz: This isn't the truck (indicating).

The Court: This (indicating) is the truck?

Mr. Deutz: Yes, your Honor, but assuming—

The Court: The truck is going the other way?

Mr. Deutz: That is right. The truck is going north. This car comes and hits here (indicating).

The Court: Yes.

Mr. Deutz: The car itself swings to this position (indicating).

The Court: That is right.

Mr. Deutz: And is found at rest right over here [349] (indicating), which is not inconsistent at all that it has come and slid sidewise, in sidewise again, and it has come to rest here, right next to the car where the colored people were standing.

The Court: I think it is a little inconsistent with the fact that with the momentum of 55,000 pounds of weight

against the average Ford sedan automobile, if that 55,000 pounds traveling at 40 miles an hour would hit that, that Ford sedan would have wound up in a great deal different position,—

Mr. Deutz: That sedan spun.

The Court: —than merely being knocked off the road.

Mr. Deutz: That sedan spun. When it hit, it hit a glancing blow, although it did considerable damage when it hit the right-hand side of the truck, it spun around until it was facing north and then spun on this side over here (indicating). Mr. McCoy testified that this truck jack-knifed across there. If that truck jack-knifed, and the Navy car hit it and bounced back up here (indicating), that Navy car was never below the point where this truck jack-knifed—it was impossible for it to ever get around. If the Navy car had hit that truck first, the Navy car would have wound up here, over on the side. Instead of that, the Navy truck wound up back up here (indicating).

The Court: It might have been, counsel—Certainly [350] nobody who has the limited facilities that I have or that any judge has is able to understand the law of physics enough to reconstruct an accident perfectly as it happened, after it happened, especially when you are dealing with speeds and a situation that is as greatly involved as in this case. But I heard all of the testimony here and most certain imponderables that nobody can describe were put on paper, and cases must be decided.

I think that, from my judgment, your motion should be denied and, moreover, from my judgment, I think the plaintiff is entitled to recover here. The question in my mind is the amount.

Mr. Deutz: Will your Honor hear argument on the question of negligence?

The Court: That is what I have been hearing.

Mr. Deutz: Well, this was directed on a motion to dismiss.

The Court: All right.

Mr. Deutz: This was not the argument on the case. The plaintiff has not even stated their theory of this case, to the present time.

The Court: Well, I suppose that the plaintiff has the theory that the defendant was negligent, or he would not have filed the lawsuit.

Mr. Deutz: Well, this is a case in which nobody knows [351] exactly what took place, but the question must be ascertained.

The Court: Judgment must be exercised as to the reasonable, probably consequences as to what happened there. All right. I would like to hear you.

Mr. Deutz: It is the plaintiff's opening argument.

Mr. McKnight: Well, your Honor, I believe under the circumstances—It is 9:10—I would like to waive my opening argument and hear counsel.

The Court: All right.

Mr. McKnight: And then if I may have a chance to answer him, if it appears necessary?

The Court: All right.

Mr. Deutz: Very well, your Honor.

Your Honor has indicated that it is the present opinion of the Court that there was negligence on the part of the government vehicle. We know, to begin with, that this was a wet, slippery road. There has been abundant testimony that Mr. Uarte's car had slick tires, smooth tires.

The Court: Is that negligence?

Mr. Deutz: It may not be negligence, but it may be a very good indicia of what might have happened in this particular case. You have a car driving down a highway. It is slippery. You have slick tires. You are driving on them late at night, at 11:30 at night. It is not unlikely that [352] people driving at that hour of the night, when they have been on a long trip, are inclined to be a little bit tired, maybe a little bit sleepy—

The Court: Maybe the Navy boys were. One thing I noticed about this case is a complete absence of testimony as to where they had been, where they were going, and how long they had been driving. I think if that had been at all material—In other words, I got to indulge in presumption here, as to that evidence that could have been produced, against the party that could have produced it, and I might say that the government certainly could have produced records.

Mr. Deutz: I have a man here in this building that could have testified in that regard, but I didn't feel it necessary.

The Court: Well, you did not produce them. The only point you are making is that you are saying that I have got to presume a presumption that Uarte was sleepy because he had been hunting and it was late at night and it was raining.

Mr. Deutz: I am just advancing another possibility, and that possibility is that it is not unlikely that a man driving at night can lose control of his car. It happens quite frequently, and on a rainy night, the results could be disastrous as they were in this accident.

The Court: Don't you think it would be more likely that a man would lose control of his car, that had passed [353] two trucks going 75 to 80 miles an hour?

Mr. Deutz: I would like to point out, your Honor, in that connection, we had a man on the stand here, a truck driver for the Golden State, who testified he was trailing another truck at a distance of a hundred yards, which, incidentally, is the legal minimum, he had to be at least a hundred yards, so his testimony was very nicely couched in those terms. Now, he testified that a car went by him at 70 to 80 miles an hour. With a space of 100 yards between those vehicles, and at a speed of 80 miles an hour, this Navy station wagon—which was supposed to have been done by a rather remarkable piece of skill—crossed into a space 300 feet long and decreased its speed to the speed of the truck, which was 40 miles an hour.

The Court: The cars were traveling at 40 miles an hour. How many feet was that a second?

Mr. Deutz: Yes, but their speeds were constant.

The Court: Yes, their two speeds; in other words, it was not moving into a solid space, it was moving into a moving space of a hundred yards.

Mr. Deutz: Yes, that is right, moving into a moving space of a hundred yards.

The Court: And in that space, he may have a thousand or two thousand feet.

Mr. Deutz: Well, that moving space was moving at the [354] rate of 40 miles an hour.

The Court: How far is that a second?

Mr. McKnight: Approximately 60 feet.

The Court: 60 feet a second?

Mr. McKnight: Approximately, yes.

The Court: Well, in three seconds it is 180, which is 3 times 60.

Mr. Deutz: And this man has a car coming towards him. So he suddenly darts into this space and he darted, according to the testimony.

The Court: And skidded.

Mr. Deutz: And skidded, so he skidded into this space at quite a remarkable speed and reduced his speed from 80 to 40 miles an hour, just like that (illustrating).

Your Honor, you could take judicial notice of the fact, I think, that that would be rather remarkable on a wet pavement.

The Court: Yes, but I believe that fellow's testimony, that truck driver; I believe his testimony.

Mr. Deutz: Well, that is where we differ in our opinion.

The Court: Well, that is my opinion.

Mr. Deutz: Also, he testified when the car passed them at 75 to 80, they could still read the insignia and everything on the car.

The Court: That is not quite his statement. He said he [355] saw "U. S. Navy" something.

Mr. Deutz: And "Recruiting."

The Court: And the other one said he saw it.

Mr. Deutz: That, of course, is a rather powerful observation.

The Court: I don't think so.

Mr. Deutz: With a vehicle passing at 80 miles an hour, and you have time to read all the description on it?

The Court: I don't think so. I think if an automobile were passing with some nice looking woman in it, then, a week later you could tell whether her hair was red or black.

Mr. Deutz: I think Mr. McCoy's testimony is to be given the benefit of any doubt. Mrs. McCoy was also in that car. They were the only eye-witnesses in this case.

The Court: Yes.

Mr. Deutz: Mrs. McCoy said she only saw one pair of headlights. She saw no dual pair of headlights, she saw no cars abreast, she saw no contact between vehicles. She did see this one car swerve toward them, and that car was the first one of the two cars in succession, that first car swerved toward them.

The Court: How could we know that the Ford sedan was the first car? How do we know that it wasn't the station wagon at this point?

Mr. Deutz: The answer to that is, if the station [356] wagon had been the first car, and if the station wagon had hit the Golden State truck, the station wagon could not have wound up in the position in which it ultimately wound up.

The Court: I don't understand that, but there isn't any testimony here at all that that first pair of headlights was the green car.

Mr. Deutz: Except that both Mr. and Mrs. McCoy testified that they believed that was the car. Now, what did they testify to—

The Court: But, the car that they saw skidding was the green car, first, but there isn't anything here, there wasn't any direct testimony at all that the first car coming down that road was the green car, as against that.

Mr. Deutz: But there was testimony that they never saw two cars abreast.

The Court: They saw four headlights.

Mr. Deutz: There was considerable doubt on that question.

The Court: Well, they did not say in that many words, four headlights. They saw a cluster.

Mr. Deutz: Mr. McCoy said on cross examination he could not positively state that those two cars were ever abreast.

The Court: That is right, but he said just before he saw the skid, he saw a cluster of headlights.

Mr. Deutz: That is right, and he saw a car skidding [357] there, and if that car skidded as Mr. McCoy testifies and hit the truck on this right-hand side, where I think photographs will indicate the damage did occur, the great damage to the car, to the truck, was on the right front, and if that right front was struck, this car would naturally swing down by the truck and would bypass it. The truck is going north. This car was going south. This car hits on the right side. If it hits on the right side, a glancing blow, how is it going to wind up back up the highway, up here?

The Court: Well, how is the truck going to turn around and be going around another direction, a 55,000-pound outfit, within a short space?

Mr. Deutz: We will get to that.

The Court: It is the same idea.

Mr. Deutz: Except when this car hits this truck on the right-hand side, it is quite obviously, unless it gets in the front directly or on this side (indicating), going to go on the left-hand side of that vehicle, which it did, because the paint marks on this south car indicate that it came smack up against the side of the truck and spun.

The Court: If it had done that, the back end of the Ford would have been crushed in, the blow would have come from the back, whereas, the evidence is it came on the side.

Mr. Deutz: It came from the side.

The Court: That is your witness' testimony. [358]

Mr. Deutz: That is right, and the side of it hit the Golden State truck. The rear did not hit. The side hit.

The Court: You maintain it hit the semi-trailer?

Mr. Deutz: That is right, the semi-trailer.

The Court: The trailer there is 24 feet long.

Mr. Deutz: That is right. At the point where the paint is rubbed off.

The Court: No, I can't go along with you.

Mr. Deutz: And when this truck makes a jack-knife, somewhere in this area up here (indicating), the vehicle coming down the highway, which is the Navy station wagon, hit that truck and bounced back.

The Court: That is all it did?

Mr. Deutz: That is the only explanation for the Navy station wagon being at that position.

The Court: So it got all crushed on one side and no crushing on the other—so it hit head-on?

Mr. Deutz: that is right.

The Court: And bounced back?

Mr. Deutz: That is right.

The Court: And got all crushed on one side and the other side is not crushed, and there was no side-swiping or anything? No.

Mr. Deutz: You will recall, this truck was in the process of turning. The collision with the Golden State [359] truck was not square into the side of the vehicle.

The Court: How is it going to bounce?

Mr. Deutz: The damage to the Golden State truck is on the right fender, the right headlight, at that area, and apparently that is the portion that was hit by the

Navy truck at the time of the impact, and that would account for the fact that the right fender of the Golden State truck was so severely damaged and the front and right side of the Navy truck, of the Navy car, was likewise very severely damaged. But, you know, that truck jack-knifed clear across the highway in the position that is shown in the illustration. Now, that can't be refuted. That is shown right there in your photograph.

The Court: Let me ask you this, counsel: Here, take this picture. How did that station wagon get all completely crushed on one side, almost as if somebody had taken it right from the middle of the radiator and just crushed it, and the other side didn't, and yet it bounced back and stayed in the same line of traffic and did not skid?

Mr. Deutz: It is one photograph.

The Court: Yes. This is the one taken at the accident. This you maintain, from this exhibit here, is just from hitting the **truck**.

Mr. Deutz: That is No. 5 and this is Exhibit 2.

The Court (continuing): And bouncing back? [360]

Mr. Deutz: That car, in our estimation, caught the Golden State truck in the process of turning. The photographs illustrate quite clearly that this truck did jack-knife—I don't believe there is any doubt of that—because when the truck came to rest, it had jack-knifed. Then, in the process of jack-knifing, the right front fender of the truck was opposed to any oncoming traffic, because the truck was jack-knifed in this position.

Likewise, a vehicle coming toward the truck from the north, the first portion to hit that truck in an angling position, while it is in the process of jack-knifing, would be the right front of that vehicle.

Now, the right front of the station wagon is the damaged portion, and as you will see here, your Honor, when you have the station wagon coming south and you have the truck in the process of jack-knifing, the first and most exposed part of that truck is the right front fender, and likewise, the vehicle coming from the north, the first point to come in contact with would be the right front of the Navy station wagon.

The Court: It could be, if we could see how it jack-knifed—

Mr. Deutz: We do know it jack-knifed.

The Court: Oh, Yes, but you say it is the first and the first exposed part, if we knew how it jack-knifed. [361]

Mr. Deutz: We know it jack-knifed to the left.

The Court: Yes, but we don't see how it jack-knifed.

Mr. Deutz: I think your Honor can take judicial notice that when a big object is turned to the left, that the right front corner is the foremost point exposed in that direction.

The Court: At sometime during the turning.

Mr. Deutz: If you take an object—

The Court: I understand you, counsel.

Mr. Deutz: You take an object and turn it—

The Court: I mean, after all, I have gone through the first grade. At some point in the turning.

Mr. Deutz: At some point in the turning, but at the time—the point is to show, your Honor, that the damage to the Golden State truck exists on that right front corner, so obviously, that was the point.

The Court: I thought you just got through telling me that it existed by virtue of the fact that the Ford sedan hit it.

Mr. Deutz: Apparently, and apparently there can be no other explanation. Both vehicles must have hit that one point. Firstly, they hit here, when the Ford sedan hit it.

The Court: I have heard the witnesses and testimony and the evidence, and I have reached the conclusion—and anybody can sit here, I mean alchemists, chemists, physicists, [362] engineers, and indeed, judges of the Circuit Court of Appeals and the Supreme Court can sit here and argue on these photographs and the evidence in this case and try to reconstruct the evidence, but, I am the one that is called upon to exercise judgment, from hearing the evidence and observing the witnesses, and I have reached the conclusion that the government is liable by virtue of negligence on the part of the defendant, and judgment will be for the plaintiff, and this is the amount—

Mr. Deutz: On the question of damages—

The Court: There isn't any question on the amount of money paid out.

Mr. Deutz: All we have is the witness' own statement as to what he paid out. He has had the opportunity to offer the receipted bills, which he failed to do. He had the opportunity to examine the doctor who was present here in Court as to what the doctor was paid. That he failed to do. The hospital at Madera is only 22 miles away and receipts could have been obtained. They were not obtained.

The Court: I think one witness testified to this fact. I think the witness was telling the truth. Do you think he was not telling the truth?

Mr. Deutz: I don't know. He is the plaintiff.

The Court: It seems to me very reasonable, the doctor bill of \$500.00, the hospital bill for the period that he

was [363] in there, and the fact that he is only asking for money he paid out to his mother and sister instead of to special nurses, for which he paid \$30.00. It seems to me there isn't any question about that at all. So we start out with the proposition that he is entitled to \$500.00 for the doctor bill; \$1,491.25 for the hospital bill; \$30.00 for special nurses; and he said he paid the hotel bills for his mother and sister—

Mr. Deutz: \$175.00.

The Court: —of \$175.00, and then he bought a brace.

Mr. Deutz: That was \$30.00.

Mr. McKnight: \$75.00, your Honor.

The Court: \$75.00 for the brace, but he did not put in the price of the crutches.

Mr. McKnight: A total of \$2,271.25, which is the exact amount prayed for in the complaint, your Honor, for medical expenses.

The Court: What is that, \$500.00, \$1,491.25, \$30.00, \$175.00 and \$75.00?

Mr. McKnight: Yes, your Honor. It should be \$2,271.25.

The Court: That is correct. All right.

Now, I haven't any idea what kind of general damages to allow. There isn't any limitation under this Tort Claims Act, is there, Mr. Deutz? [364]

Mr. Deutz: No, your Honor.

Mr. McKnight: May I suggest, also, that from July 24th until the middle—

The Court: What were his wages?

Mr. McKnight: From July 24th to the middle of February, when he says he went back to work, full time,

his losses at \$270.00 a month would be \$1,765.00, which is the amount we alleged in our complaint, making a total of \$4,036.25 special damages.

The Court: How much?

Mr. McKnight: Well, we have alleged in our complaint \$1,765.00. I believe that was the exact amount, making a total of \$4,036.25; and it is stipulated that the damages to the automobile were what?

Mr. Deutz: \$593.80.

The Court: \$593.80. That is \$4,630.05 special damages.

Mr. McKnight: Yes, your Honor.

The Court: All right.

Now, in the matter of general damages, on situations like this, it is a matter that I have never yet found a formula for, either for asking as a lawyer or deciding as a judge. How old is he?

Mr. McKnight: He is 36, I believe.

The Court: 36? [365]

Mr. McKnight: Or is that the age?

The Plaintiff: I am 37.

Mr. McKnight: 37, your Honor.

The Court: 37 years old. I think principally his damage would be from pain and suffering. Well, of course, the prognosis is perhaps indefinite; he will be deprived of occupational or recreational facilities, and things that he might have done. Still, people get deprived of those things by virtue of their very occupation, as I have found since I have been a judge.

Mr. McKnight: Well, he has suffered very severely.

The Court: Yes, he has suffered very severe pain.

Mr. McKnight: And I believe there is some permanent injury.

The Court: Yes, I think there is some permanent injury. I think that is almost obvious.

Mr. McKnight: He won't be completely recovered, of course not, at best.

Mr. Deutz: The doctor's testimony does not shed very much light on that point.

The Court: No, no, and I don't know that you could get any that would, because I think that any doctor would hesitate to indicate any prognosis of what might happen in the future, on a history of this kind of a case—it might be bad, it might be good, except that the testimony is that he [366] is steadily improving. Well, I guess nobody in the world would go through an experience like this, even if you had to pay them for it in advance, for any amount of money, but after all, there must be some reasonable limitation.

I think that the plaintiff here would be compensated if he had a judgment for general damages, for the sum of \$12,500.00.

And the judgment of the Court will be for \$4,630.05 special, and \$12,500.00 general, or a total of \$17,130.05, and in fixing that amount I have taken into consideration, as the Appellate Courts say, that I am entitled to and must, the decreased purchasing power of the dollar.

Counsel will prepare findings of fact and conclusions of law and a proposed judgment and submit them under

the rules, with the five days' notice, or longer if it is necessary for counsel to examine them.

Mr. McKnight: Yes, your Honor.

Mr. Deutz: As I will be returning to Los Angeles, I suggest a little longer than five days in the premises.

The Court: Well, I will hold whatever findings of fact and conclusions of law are submitted until I am satisfied, Mr. Deutz, that you have had an opportunity to examine them.

Mr. Deutz: Very well, your Honor.

The Court: All right. Court is adjourned.

[Endorsed]: Filed Sep. 9, 1948. Edmund L. Smith, Clerk. [367]

[Endorsed]: No. 12042. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Ernest J. Uarte, Appellee. Transcript of Record. Appeal From the District Court of the United States for the Southern District of California, Northern Division.

Filed September 23, 1948.

PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the
Ninth Circuit

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12042

UNITED STATES OF AMERICA,

Appellant,

v.

ERNEST J. UARTE,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant intends to rely upon the following points on Appeal of the above entitled cause.

I.

That the District Court of the United States for the Southern District of California, Northern Division, erred in granting judgment for the appellee, and against the appellant herein, for the following reasons:

- (a) The trial court's findings of fact on the issue of negligence of the Government driver were clearly erroneous in that they were unsupported by the evidence adduced.
- (b) The appellant's motion for judgment and non-suit at the close of the appellee's case, and at the close of all the evidence, should have been granted.
- (c) The court erred in hearing testimony relative to the speed of the appellant's vehicle at a distance of 10 to 12 miles from the scene of the accident.

- (d) The court erred in hearing testimony relative to the speed of the appellant's vehicle at a distance of 4 to 5 miles from the scene of the accident.
- (e) The evidence as to special damages was insufficient and incompetent in that the court overruled the appellant's objection that the testimony of the appellee was not the best evidence of special damages when documentary evidence and/or qualified witnesses was available.
- (f) The court erred in permitting Don McCoy to be called and examined as an adverse witness by the appellee under the provisions of Rule 43(b).
- (g) The court erred in overruling the appellant's objections to the appellee's findings of fact.

II.

That the District Court of the United States for the Southern District of California, Northern Division, erred in not granting judgment for the appellant on its counterclaim against the appellee herein.

JAMES M. CARTER

United States Attorney

ERNEST A. TOLIN

Chief Assistant U. S. Attorney

CLYDE C. DOWNING

Assistant U. S. Attorney

Chief of Civil Division

MAX F. DEUTZ

Assistant U. S. Attorney

Attorneys for Appellant

[Endorsed]: Filed Sep. 23, 1948. Paul P. O'Brien,
Clerk.

[Title of United States Circuit Court and Cause]

STIPULATION RE USE OF ORIGINAL EXHIBITS
ON APPEAL

It is hereby stipulated by and between the parties hereto, through their respective counsel, that the original exhibits, consisting primarily of photographs, may be used on appeal by the Circuit Court of Appeals, subject to the approval thereof, in lieu of their reproduction in the printed record on appeal.

JAMES M. CARTER

United States Attorney

ERNEST A. TOLIN

Chief Assistant U. S. Attorney

CLYDE C. DOWNING

Assistant U. S. Attorney

Chief of Civil Division

MAX F. DEUTZ

Assistant U. S. Attorney

Attorneys for Appellant

STAMMER & McKNIGHT

By Galen McKnight

Attorneys for Appellee

It Is So Ordered This 24th Day of September, 1948.

CLIFTON MATHEWS

Judge, Ninth Circuit Court of Appeals

[Endorsed]: Filed Sep. 23, 1948. Paul P. O'Brien,
Clerk.

No. 12042

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ERNEST J. UARTE,

Appellee.

APPELLANT'S OPENING BRIEF.

JAMES M. CARTER,
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FILED

DEC 16 1948

UL P. O'BRIEN,

CLERK



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No. 12042

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ERNEST J. UARTE,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Upon Which It Is
Contended That the District Court Had Juris-
diction.

Appellee alleges the negligence of employees of the United States of America, to-wit, one or the other of two members of the United States Navy.

Jurisdiction is invoked under the provisions of Title 28, United States Code, Section 921 *et seq.*, commonly known as the Federal Tort Claims Act (now Title 28, United States Code, Sec. 1346), which provides:

“(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal

Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the *law of the place where the act or omission occurred.*" (Italics added.)

Appellants have appealed to this Court pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

Appellee filed this action against appellant, Department of the Navy; Twelfth Naval District; Golden State Company, Ltd.; Don Arthur McCoy, and others. Appellee alleged negligence in the operation of a motor vehicle by one or the other of two United States Navy enlisted men as the result of which appellee suffered severe personal injury. Both Navy men died as the result of the accident.

Another action was brought in the Superior Court of Madera County wherein the widows of the two Navy men, Richard Francis Rogers and Roger Davis Green, sued this appellee and the Golden State Co., Ltd., for wrongful death. At the trial, the jury disagreed on the liability of appellee and the Court granted a non-suit as to Golden State Co., Ltd. On appeal, the District Court of Appeal reversed the order of non-suit and the case is presently

set for trial on the question of the liability of both appellee and Golden State Co., Ltd.

This complaint alleges that one or the other of the Navy men “operated and used said Ford station wagon, and defendant Don Arthur McCoy negligently drove, operated and used said tractor and semi-trailer, and thereby *caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by plaintiff, and caused said Ford sedan automobile to come into collision with said tractor and semi-trailer*, injuring and damaging plaintiff and his said Ford sedan automobile as is hereinafter described.” (Italics added.)

The tractor and semi-trailer were owned by the Golden State Co., Ltd., and driven by Don Arthur McCoy. After motion of the appellant all parties defendant except the appellant were dismissed from the action either voluntarily or by the Court on the ground that the United States alone was a proper party defendant under the Federal Tort Claims Act.

Both occupants of the government vehicle were killed in this accident. The appellee suffered amnesia as a result of the accident and claims loss of memory of all events for some time prior to the accident and up until weeks after he had been hospitalized for his injuries.

The only known and undisputed facts are those set forth in a stipulation filed on the first day of trial [Tr. pp. 30-31] that appellee’s and appellant’s vehicles were both proceeding south on U. S. Highway 99, 2.6 miles north of Madera, California, and that a Golden State trac-

tor and semi-trailer was proceeding north on said highway. It is also undisputed that the accident occurred about 11:30 o'clock P. M. on a wet, rainy night and that the road was very slippery. The highway was a 22-foot, two-lane, paved highway at the point of the accident. The highway had paved shoulders on both sides.

It is the contention of the appellant that beyond these established facts the appellee utterly failed to show the slightest act of negligence proximately causing or contributing to the injuries of the appellee. The counterclaim of appellant asked damages for the destruction of its vehicle.

At the close of the plaintiff's case [Tr. p. 195] appellant moved for a dismissal of the action on the ground of a total failure of proof of negligence. This motion was renewed at the close of all of the evidence [Tr. p. 291]. The motion was denied.

Appellant's Specification of Errors.

I.

That the District Court erred in granting judgment for the appellee, and against the appellant herein, for the following reasons:

- (a) The trial court's findings of fact on the issue of negligence of the Government driver were clearly erroneous in that they were unsupported by the evidence adduced.
- (b) The appellant's motion for a judgment of dismissal and/or non-suit at the close of the appellee's case, and at the close of all the evidence, should have been granted.

- (c) The Court erred in hearing testimony relative to the speed of the appellant's vehicle at a distance of 10 to 11 miles from the scene of the accident.
- (d) The Court erred in hearing testimony relative to the speed of the appellant's vehicle at a distance of 4 to 5 miles from the scene of the accident.
- (e) The Court erred in permitting Don McCoy to be called and examined as an adverse witness by the appellee under the provisions of Rule 43(b), F. R. C. P.
- (f) The Court erred in overruling the appellant's objections to the appellee's findings of fact.

II.

That the District Court erred in not granting judgment for the appellant on its counter-claim against the appellee herein.

Summary of Appellant's Argument.

The appellant admittedly has a difficult and exacting task on appeal in showing, to the satisfaction of the Court, that there was, in fact, not one iota of evidence, much less a preponderance of evidence, to support the District Court's finding of negligence on the part of the Government employees. If such finding was erroneous, the Court again erred in not dismissing the action.

Appellant further contends that the Court erred in permitting the introduction of evidence as to the speed of the Government vehicle in isolated instances at remote dis-

tances of 5 and 11 miles without any additional evidence showing the speed or manner of operation of said vehicle between those remote points and the scene of the accident, or any evidence indicating that the speed of the Government vehicle was in any way a cause of the accident.

The Court erred in permitting Don McCoy to be called and examined as an adverse witness by appellee pursuant to Rule 43(b), F. R. C. P.

The Court's statements at the trial indicated clearly that it thought the appellant's vehicle struck the Golden State truck first instead of appellee's vehicle striking the truck as alleged in the complaint. This view was so untenable under the evidence that the Court, in its Findings of Fact, withdrew to the safer ground afforded by the allegations of the complaint. Appellant contends that the Court, like the only parties present at the scene of the accident who survived, was entirely at a loss to reach a logical conclusion as to what actually transpired at the scene of the accident. In this regard it should be noted that only Don McCoy and his wife actually saw the accident and are mentally able to relate their observations.

If appellant's contentions are otherwise correct, the Court erred in not granting judgment on appellant's counterclaim.

APPELLANT'S ARGUMENT.

I.

The District Court Erred in Granting Judgment to Appellee.

(a) THE FINDINGS OF FACT ARE UNSUPPORTED BY THE EVIDENCE.

This is an extremely unusual case in that the Government driver and passenger were killed, the appellee claims amnesia, his passengers were admittedly asleep when the accident occurred, and the driver and passenger in the Golden State truck saw only a portion of what transpired. Therefore, a very careful examination of all the evidence received will be necessary to fully appraise this case. The printed transcript contains the entire record of the trial including *all* testimony and evidence.

The appellee alleged that the Government car struck appellee's car causing appellee's car to strike the Golden State truck. The Court adopted this view in its findings.

The known facts are mostly covered by a stipulation filed on the first day of trial [Tr. pp. 30-31]. These concede that both appellant's and appellee's cars were proceeding south on U. S. Highway 99 about 2.6 miles north of Madera, California. The Golden State truck was proceeding north on the same highway. The truck-tractor and semi-trailer was approximately 57 feet in length [Tr. pp. 45 and 152].

The highway was wet and slippery, it being the first rain of the season [Tr. p. 63]. The highway was 22 feet wide and was divided by a white line down the center. There were 7-foot paved shoulders on each side of the road [Tr. p. 40].

The physical facts show that after the accident was over the Golden State truck had jackknifed to the left, that only the trailer remained on the highway (at right angles across the road), and the tractor and semi-trailer were headed south [Ex. 13]. The Government car stood sideways on the road about 40 feet *north* of the trailer and the Green Ford (appellee's car), stood in a field nearly 94 feet *south* of the trailer [Ex. 13]. Thus appellee's car had passed *beyond* the Golden State truck while the Government station wagon was still to the *north* of the truck.

From this point on any theory on the part of either of the parties as to what actually occurred must be pure conjecture. The appellant has a theory as to what transpired. Likewise the appellee has one. The appellant will point out wherein the meagre evidence available supports appellant's theory and lends no aid or substance whatever to the contentions of the appellee.

In a negligence action, the plaintiff must prove negligence by a preponderance of the evidence. In this case we shall point out that there is not one iota of evidence, much less a preponderance of evidence, to show negligence of Government employees proximately causing the accident in question.

Appellee's theory is set forth above. The appellant also has a theory as to what might have transpired. First of all, a reading of the transcript of the trial will reveal that there is no evidence as to which of the two cars (appellee's or appellant's) was first to approach the northbound Golden State truck. Don McCoy stated, however, that appellee's car was first to hit him [Tr. p. 125] and that he did not see one car attempt to pass the other [Tr. p. 124]. Therefore, if any assumptions are to be made as to which car was first, they should lean toward that car

being that of appellee. As appellee and his companions had been driving from north of Sacramento during the afternoon and through a dark, rainy evening to about 11:30 P. M., and as all appellee's companions were asleep [Tr. pp. 172, 176], it is not unlikely that appellee fell asleep at the wheel, or he blew a tire, and he lost control of his car. Evidence shows appellee's car had smooth tires [Tr. pp. 202, 254, 266, 271]. It should be noted that there is no physical evidence of a contact between appellee's and appellant's car or any testimony indicating that there was such a contact prior to the collision with the truck. Plaintiff introduced no evidence to show physical damage to the vehicles indicating contact between appellee's car and the Navy station wagon. Support is afforded appellant's theory by the statement of Don McCoy [Tr. p. 134], admittedly a conclusion or guess [Tr. p. 157], that appellee "was clipped, *blew a tire, or skidded, or something.*" (Italics ours.) Weight is added to this theory by McCoy's statements [Tr. pp. 149 and 157] that he saw no impact between the vehicles. In addition, *the physical evidence shows that appellee's car must have struck the truck first because it went past the truck* [Ex. 13] *after the impact.* Further, when appellee hit the truck, the driver of the truck lost control [Tr. pp. 139 and 155] and the truck jackknifed [Tr. pp. 154, 155]. The fact that *the Government station wagon ended up 40 feet north of the truck* proves, we believe, that the station wagon struck the truck as the truck was jackknifing into the station wagon's lane of traffic. It thus never got beyond the point of impact and in fact was bounced back by the impact. Appellant believes that the Government car was an innocent participant to this accident, that it was following appellee's car down the highway, and that

the Government car first participated in the accident only after appellee had struck the truck and caused it to jack-knife in front of the Government car.

Appellee's entire case is, we believe, predicated on the following portions of the evidence:

- (1) That on the night of the accident, Don McCoy gave a statement stating that he saw two sets of headlights and then only one, that then the headlights seemed to bunch and jump [Tr. p. 131].
- (2) That McCoy had stated at that time "It appears to me that one clipped the other and threw him there, or one blew a tire, or something." [Tr. p. 132.]
- (3) That W. R. Daniels, another Golden State Co. driver, had stated he was passed by the Navy car 4 to 5 miles from the scene of the accident [Tr. p. 108], and that at that time the Navy car was traveling about 70 to 80 miles an hour [Tr. p. 110], and had passed over a double line [Tr. p. 111].
- (4) That Allan Roberts had stated that he was passed by the Navy car 10 or 11 miles from the scene of the accident [Tr. p. 96], and that at that time the Navy car was traveling about 70 to 80 miles per hour [Tr. p. 96], and skidded as it was passing [Tr. p. 97].

This testimony is the only part of the record helpful to appellee's case. It, however, does not show wherein the Navy car was negligent.

The weaknesses of this testimony are clear. The testimony attributed to Don McCoy was elicited only from the statement made the night of the accident. McCoy stated

that this statement was purely a conclusion [Tr. pp. 129, 157] because he did not see the appellee's car and the Navy car collide or touch each other [Tr. pp. 149, 157], he never saw these cars abreast of each other [Tr. p. 148], he never saw headlights come into the northbound lane of the highway before Uarte swerved [Tr. p. 149], he could not say one car was overtaking the other [Tr. p. 150], he refused to state that the Uarte car was "clipped" [Tr. p. 134], he was unable to estimate the speed of the approaching vehicles [Tr. p. 124], and his impression was that one vehicle did not start around the other [Tr. p. 124]. Further, he definitely identified the Uarte car as the one which skidded in front of him and hit his truck [Tr. pp. 125, 144]. He was examined by appellee as an adverse witness pursuant to F. R. C. P. Rule 43(b), although his position in the case was actually adverse to the United States.

The testimony of Allan Roberts and W. R. Daniels at distances 10 to 11 and 4 to 5 miles from the scene of the accident was entirely remote as far as any evidence of negligence was concerned. Roberts stated the station wagon went right out of sight and was not seen again until the scene of the accident was reached 12 minutes later [Tr. pp. 97, 102]. Daniels testified that the station wagon passed out of sight as soon as it went around the rig ahead, still 4 to 5 miles from the scene of the accident [Tr. p. 118]. Both witnesses stated that they did not see the Navy car again until the scene of the accident. Thus they were not in a position to trace the speed, or the manner of operation, of the Government vehicle up to the scene of the accident. Their testimony is therefore not only valueless on the question of negligence, but should have been held inadmissible.

Some point may be made by the appellee that the amount of damage sustained by the station wagon indicates excessive speed. The same is true of the appellee's car. However, the Court can take judicial notice of the fact that the more or less flimsy superstructure of a station wagon will sustain greater damage at an identical speed than would a vehicle with an all steel top, as that of appellee. Furthermore, the highway speed at this point was 55 miles per hour and any differentiation between the amount of damage that would be done at 45, or 55, or more miles per hour on a slippery road would be pure conjecture.

It should also be noted that the evidence discloses no markings upon the Navy station wagon to indicate a contact with the Uarte car. In fact, the witness Burgess testified that a careful half-hour examination of the Navy car failed to reveal any traces of green paint or cream paint on that car [Tr. p. 259]. Uarte's car was green [Tr. pp. 59 and 125]. Witness Northridge testified the same [Tr. p. 274]. Witnesses Burgess, Northridge, Segren and McCoy testified to finding cream paint on the left rear of the Uarte car [Tr. pp. 256, 257, 266, 272 and 153]. The Golden State Truck was a cream color [Tr. p. 153]. The Uarte car showed no trace of color similar to that of the blue Navy station wagon [Tr. p. 269]. Two witnesses testified to a deep scratch on the cream colored side of the Golden State semi-trailer [Tr. pp. 206, 152].

There was some evidence of gouge marks on the highway. These defy explanation, but they should not be used to make a case against the appellant just for that reason. No witness could offer a reasonable explanation of these marks or say that the marks arose out of this particular accident.

Exhibit No. 14 shows the position of the bodies, P-1 being the body of one sailor [Tr. p. 178], P-3 the other sailor [Tr. pp. 48, 178], and P-2 Uarte [Tr. p. 178].

The appellant believes that the evidence as set forth above shows what transpired in this case to be as follows: Two cars were going south on a dark, slippery road [Tr. p. 123]. The first car carried appellee [Tr. p. 125]. Suddenly that car swerved sharply to the left [Tr. p. 125], and skidded across the highway with the rear wheels reaching the opposite shoulder of the road first [Tr. p. 161], the driver (Uarte) then regained partial control of the car and headed back across the highway toward his proper lane [Tr. pp. 125, 144]. At this point his car struck the right front wheel of the truck tractor [Tr. pp. 125, 126], causing the car to spin to the left and causing the left rear of the car to strike the side of the semi-trailer where it left a deep scratch [Tr. p. 152], and picked up cream colored paint [Tr. p. 153]. This car continued to spin and slid sideways into a field where it came up alongside a parked car. Meanwhile, the driver of the truck lost control of his vehicle when Uarte's car struck his right wheel and set his steering wheel spinning [Tr. p. 155]. The truck, out of control, jackknifed to the left into the position shown in Exhibits 13 and 14 [Tr. p. 137]. While in the process of turning, the truck was struck by the Navy vehicle which had been following behind Uarte. As the truck jackknifed to the left, the first portion of the truck hit was the right front [Tr. p. 144]. The Navy car was crumpled and thrown back but the body of one Navy man was left at the point of impact beneath the rear wheels of the truck trailer [Tr. p. 178].

Prior to the above described events, something caused Uarte to skid. What that something was, no person is

available to state. The statements upon which appellee will rely have been discussed at length. They do not show any act of negligence on the part of Government employees either expressly or by inference. Instead the physical facts indicate that Uarte never came in contact with the Navy car but instead was ahead of the Navy car when some unexplained event, a flat tire, drowsiness, or a slick part of the road, coupled with the fact that his tires were not suited for wet weather travel, caused him to lose control of his car and become involved in this accident. The appellant leaves this point with this challenge to the appellee: "*What* act of negligence of a Government employee is shown by the evidence introduced in the trial of this case?"

(b) DISMISSAL OR NON-SUIT SHOULD HAVE BEEN GRANTED.

If the appellant is correct in its proposition that the finding of negligence was not supported by the evidence, then as a matter of law, a judgment of dismissal or non-suit should have been granted the appellant.

(c) ERROR IN ADMITTING EVIDENCE OF SPEED OF GOVERNMENT CAR 10 TO 11 MILES FROM SCENE OF ACCIDENT.

(d) ERROR IN ADMITTING EVIDENCE OF SPEED OF GOVERNMENT CAR 4 TO 5 MILES FROM SCENE OF ACCIDENT.

The appellant objected to the admission of testimony as to the speed of the Navy vehicle at distances of 10 to 11 miles and 4 to 5 miles, respectively, from the scene of the accident. The improper admission of this evidence was particularly important because it served to prejudice the Court against the appellant.

The testimony in question is that of Allan Roberts who stated that he saw the station wagon 10 to 11 miles before the scene of the accident [Tr. p. 96], and that the station wagon skidded in passing [Tr. p. 97]. W. R. Daniels testified that he was passed by the station wagon 4 to 5 miles from the scene of the accident and that it crossed over a double line in passing Daniels. Objections were made to this testimony and the objections were overruled summarily by the Court despite the proffer of case authorities [Tr. pp. 96, 110-113].

The general rule established by a long line of cases appears to be that evidence of conditions remote in time and distance from the time and place of the accident in question is inadmissible.

Blashfield, Cyclopedia of Automobile Law and Practice, Section 6176.

The California rule appears to be that laid down in *Pruitt v. Krovitz*, 139 P. 2d 992, 59 Cal. App. 2d 666, where the Court said at page 994:

“As said, however, in *Ackel v. American Creamery Co.*, 12 Cal. App. (2d) 672, 55 P. (2d) 1195, the law is well established in this state that the admission or rejection of evidence as to the rate of speed a vehicle is traveling before a collision occurs rests in the sound discretion of the trial court. The question rests so largely within its discretion that no fact or positive rule can be laid down governing the matter, for which reason the *ruling of the trial court as to the admission or rejection of this sort of evidence will not be disturbed except upon a showing of abuse of discretion.* *Ritchey v. Watson*, 204 Cal. 387, 268

P. 345; Traynor v. McGilvray, 54 Cal. App. 31, 200 P. 1056; Wagy v. Brave, 133 Cal. App. 413, 24 P. (2d) 209. Here no abuse of discretion is shown.” (Italics ours.)

This appellant contends that there has been a *clear abuse of discretion* in the present case.

In this case, witness Roberts stated the station wagon went right out of sight (it was night) after passing him and it was not seen again until the scene of the accident was reached 12 minutes later [Tr. p. 97, 102]. Witness Daniels testified that the Navy car went out of sight after passing the rig ahead [Tr. p. 118]. He arrived at the scene of the accident 5 to 6 minutes later [Tr. p. 118]. There was no evidence whatever of the speed of the Navy car from these isolated places to the scene of the accident, or at the scene of the accident, other than the fact that the Navy car was greatly damaged. As stated hereinabove, the relative damage that would be done to a car at different speeds on a wet, slick highway is purely conjectural. Note should be made of the fact that appellee’s car was also greatly damaged although it hit only a glancing blow and despite the fact that appellee’s car was not as flimsy in construction as a station wagon such as that operated by the Navy here.

With no showing of speed or conduct of the Navy car except on those two isolated and distant occasions, it is believed that the Court clearly abused its discretion here. This accident occurred on the heavily traveled inland route of the Coast Highway, U. S. Highway 99, and this Court can take judicial notice of the many variable factors tending to effect or diminish speed between any two points on such a highway.

A considerable number of cases have been examined on the question as to what constitutes remoteness under the definition set forth above. No case was found wherein the Court allowed evidence of speed at such distant points as in the instances allowed by the Court in this case.

In *Pruitt v. Krovitz*, *supra*, the leading California case, the evidence was of speed at a distance of *one block* from the scene of the accident. In the case cited in the *Pruitt* case, *Ackel v. American Creamery Co.*, 55 P. 2d 1195 (1936), the trial court *disallowed evidence* of speed *one and one-half blocks* from the accident and the appellate court said this was not error. Some of the other cases are as follows:

Evidence of Speed Not Allowed.

Winn v. Consolidated Coach Corp., 65 F. 2d 256, C. C. A. 6 (1933) (distance one-half mile);

Gritsch v. Pickwick Stages System, 81 P. 2d 257, 27 Cal. App. 2d 494 (distance one mile);

Grand v. Kasviner, 153 Pac. 243, 28 Cal. App. 530 (distance 5 blocks);

Stevens v. Potter, 209 Ky. 705, 273 S. W. 470 (distance $\frac{1}{4}$ mile);

Ramp v. Osborne, 115 Or. 672, 239 Pac. 112 (distance 4 to 5 miles);

Young v. Campbell, 177 Pac. 19, 20 Ariz. 71 (speed before accident inadmissible where speed at scene of accident not proved);

Prince v. Petersen, 12 N. W. 2d 704, 144 Neb. 134 (distance $2\frac{1}{2}$ miles);

Wright v. So. Carolina Power Co., 31 S. E. 2d 904, 205 S. C. 327 (distance one block);

Barnes v. Teer, 10 S. E. 2d 614, 218 N. C. 122
(distance three to four miles);

Neyens v. Gehl, 15 N. W. 2d 888, 235 Iowa 115
(distance 8 to 10 miles);

Hutteball v. Montgomery, 60 P. 2d 679, 187 Wash.
516 (distance several miles);

Gough v. Harrington, 141 So. 280, 163 Miss. 393
(distance several hundred yards);

Utility Trailer Works v. Phillips, 29 So. 2d 289,
249 Ala. 61 (distance 4 to 10 miles);

Rzeszewski v. Barth, 58 N. E. 2d 269, 324 Ill. App.
345 (distance 6 blocks).

Evidence of Speed Allowed.

Dromey v. Interstate Motor Freight Service, 121
F. 2d 361, C. C. A. 7 (allowed distance $1\frac{1}{2}$
miles *where corroborated by evidence of speed at
scene of accident*);

Mcville v. State of Maryland to Use of Morris,
155 F. 2d 440, C. C. A. 4 (1946) (allowed speed
at distance of 300 yards where only 15 seconds
separated witness and accident);

Sosnowski v. Lenox, 53 A. 2d 388, 133 Conn. 624
(distance 2 blocks plus other evidence);

Reardon v. Marston, 38 N. E. 2d 644, 310 Mass.
461 (distance 80 feet);

Johnson v. Farrell, 298 N. W. 256, 210 Minn. 351
(allowed distance $\frac{1}{2}$ mile *where followed to scene
of accident*);

Long v. Mild, 149 S. W. 2d 853, 347 Mo. 1002 (allowed distance several miles where witness followed car to within $3\frac{1}{2}$ blocks of accident);

Walsh v. Murray, 43 N. E. 2d 562 (allowed distance $\frac{1}{2}$ mile);

Ries v. Cheyenne Cab & Transfer Co., 79 P. 2d 468, 53 Wyo. 104 (1938) (allowed distance two blocks);

Still v. Swanson, 27 P. 2d 704 (Wash. 1933) (constant evidence of speed followed to scene of accident admissible);

Hanson v. Schrick, 85 P. 2d 355, 160 Or. 397 (1938) (exclusion of speed at $1\frac{1}{2}$ miles held abuse of discretion where evidence conflicting on speed at scene of accident);

Lundgren v. Converse, 93 P. 2d 819, 34 Cal. App. 2d 445 (distance $1\frac{1}{2}$ miles, evidence allowed);

Stubbs v. Allen, 10 P. 2d 983, 168 Wash. 156 (distance $\frac{1}{2}$ mile, evidence of speed allowed *where witness observed car to scene of accident*).

The appellant's conclusion is that from all the cases cited above, it is clear that none of these courts contemplated the admission of evidence of speed of a vehicle at such great distances as was allowed here. In the cases where allowed, there were additional factors other than the mere observance of speed at an isolated point not contiguous to the point of impact. It is therefore felt that the trial court clearly abused its discretion in the present case and that this is reversible error.

(e) THE COURT ERRED IN PERMITTING DON MCCOY TO BE CALLED AND EXAMINED AS AN ADVERSE WITNESS BY APPELLEE UNDER THE PROVISIONS OF RULE 43(b), F. R. C. P.

In the present action, appellee was the plaintiff and the appellant, Department of the Navy; Twelfth Naval District; Golden State Co., Ltd., Don Arthur McCoy and others were originally defendants. All parties defendant except appellant were dismissed from the action either voluntarily or by the Court. (Opinion rendered by the Honorable Leon R. Yankwich, 7 F. R. D. 705, on the ground that the United States above is a proper party defendant under the Federal Tort Claims Act.)

In the Superior Court of Madera County, California, the widows of the two Navy men who operated appellant's vehicle brought an action for wrongful death naming this appellee, Golden State Co., Ltd., and Don Arthur McCoy as defendants.

Counsel for appellee recited these facts in asking the trial court to permit the calling of Don McCoy as an adverse party witness pursuant to F. R. C. P., Rule 43(b). The discussion of the question and the Court's remarks and ruling are found at pages 118 to 121, inclusive, of the printed Transcript of Record.

Rule 43(b), F. R. C. P., reads as follows:

“(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party”

The Court indicated that this witness was not hostile [Tr. p. 120]. The Court presumed that as McCoy was a party to the action pending in the State Court, he would be an unwilling witness here [Tr. pp. 120, 121]. This presumption is believed to be unjustified inasmuch as McCoy would be unwilling and hostile as to the United States, this appellant, rather than to appellee, because McCoy's adversaries in the State Court were the widows of the Government employees. Appellee was only a co-defendant in that action.

The Court went further and held McCoy to be an adverse party within the meaning of F. R. C. P. 43(b). As Golden State Co., Ltd., and McCoy were dismissed from this action, McCoy can hardly be considered an adversary at this time.

The adversary rules of Rule 43(b) and California Code of Civil Procedure, Section 2055, were adopted to prevent an *adversary* from concealing prejudicial facts to his advantage and to the detriment of the other party. Such is not the case here. McCoy's testimony in this action would not prejudice himself or his employer here, nor would any finding of negligence of either party in this case prejudice him in the Superior Court action. It is submitted that Don McCoy is not an adverse party within the meaning of the rule. An examination of the cases construing Rule 43(b) and Code of Civil Procedure Section 2055 has not disclosed a definition of an "adverse party" in any situation analogous to that presented here.

The examination pursuant to Rule 43(b) permitted appellee to introduce the statement made by McCoy on the night of the accident which, though disavowed by McCoy as a pure conclusion or guess [Tr. pp. 129, 157], was

obviously the main point upon which the Court reached a conclusion of negligence on the part of appellant. For this reason, the ruling of the Court was highly prejudicial and for the reasons stated above, is believed to be error.

(f) THE COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTIONS TO THE APPELLEE'S FINDINGS OF FACT.

On June 3, 1948, the appellant filed its Objections to Plaintiff's Findings of Fact and Conclusions of Law. The objection was directed at Paragraph I of said findings wherein the Court adopted the allegations of the complaint that "defendant, United States of America, by and through its employees and agents, Richard Francis Rogers and Roger Davis Green, negligently drove, operated and used a Ford station wagon owned by defendant, United States of America, and thereby caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by plaintiff, Ernest J. Uarte, and caused said Ford sedan automobile to come into collision with a truck owned by Golden State Company, Ltd. . . ."

Appellant has heretofore discussed at great length the fact that the evidence does not support such a finding. The record does not show wherein the Government car ever came into contact with the Uarte car. There is no evidence of physical damage or paint marks indicating that the two cars came in contact with each other. The only witness stated that he never saw any contact between them. Furthermore, the trial court disbelieved this theory as indicated in its remarks upon argument of the case [Tr. pp. 298-308 incl.]. The Court stated, in relation to witness McCoy, the truck driver, who had stated that Uarte hit him first, "As a matter of fact, I wouldn't be surprised but what it wasn't the station wagon that

got out of line and came along and smacked him, then.” This position was untenable in light of the physical evidence that Uarte did, in fact, strike McCoy’s truck first, and the Court then withdrew to the safer ground afforded by the appellee’s complaint. The Court also disbelieved the physical evidence and testimony that the McCoy truck jackknifed, although appellee so believed and considered that part of his case, when the Court said [Tr. p. 309]: “Well, how is the truck going to turn around, be going around another direction, a 55,000 pound outfit, within a short space?” This indicates we believe, that Court did not fully grasp the factual situation as it existed in this case. As the evidence does not support the finding that the Navy car *collided* with the Uarte car, it is respectfully submitted that this was error.

II.

The District Court Erred in Not Granting Judgment for Appellant on Its Counter-Claim.

This matter has been fully covered in the factual discussion hereinabove. There is no evidence of negligence or contributory negligence on the part of the Government employees. However, there is evidence that appellee swerved sharply across the highway [Tr. pp. 125, 144], causing the truck driver to lose control of his truck [Tr. pp. 139, 155], and causing the truck to jackknife into the southbound lane of traffic [Ex. 13, 14], thus involving the Government car. This, it is submitted, constituted sufficient negligence on the part of appellee to allow recovery to the appellant on its counterclaim. Failure to so find this appellant contends to be error.

Conclusion.

Therefore, this appellant respectfully submits that a careful examination of the transcript will reveal that there is not one particle of evidence, much less a preponderance of the evidence to show negligence on the part of appellant, its agents or employees. It will also reveal that the trial court did not grasp the significance of the facts presented and that said Court permitted itself to be swayed and prejudiced by inadmissible evidence. In addition, there are several errors of law set forth herein, any one of which would justify a reversal of the judgment which is the subject of this appeal. It is again respectfully urged that this Honorable Court reverse the judgment heretofore entered for the appellee herein and render a judgment for the appellant on its counterclaim.

Respectfully submitted,

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No. 12,042

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

ERNEST J. UARTE,

Appellee.

BRIEF FOR APPELLEE.

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FILED

JAN 25 1949

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CLERK

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No. 12,042

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

ERNEST J. UARTE,

Appellee.

BRIEF FOR APPELLEE.

I.

STATEMENT OF PLEADINGS AND FACTS.

This is an action for personal injuries by appellee, Ernest J. Uarte, against appellant, United States of America, upon a complaint alleging that appellant, through its agents, Richard Francis Rogers and Roger Davis Green, negligently drove, operated and used a Ford station wagon owned by appellant, and thereby caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by appellee, and caused said Ford sedan automobile to come into collision with a tractor and semi-trailer owned by Golden State Company, Ltd., and driven by one Don Arthur McCoy.

The action was filed and tried under the Federal Tort Claims Act, Title 28, United States Code, Section 931, et seq.

The action was tried without a jury before the Honorable Peirson M. Hall, who rendered his judgment in favor of appellee and against appellant in the sum of \$17,130.05.

Briefly, the facts were as follows:

The accident occurred on or about July 24, 1946, at approximately 11:30 o'clock P.M. on U. S. Highway 99, approximately 2.6 miles north of the City of Madera.

At the place of the accident, U. S. Highway 99 consisted of pavement approximately 22 feet wide, divided into two lanes of traffic separated by a single white line.

At the time of the accident, it was raining and the highway was wet, slippery and dangerous.

Appellee, Ernest J. Uarte, was driving his Ford sedan automobile in a southerly direction on his right side of the road.

Don Arthur McCoy was driving the Golden State Company truck, semi-trailer and trailer in a northerly direction on his right side of the road.

Richard Francis Rogers and Roger Davis Green, who were both Chief Petty Officers in the United States Navy, and who were both employees of appellant, acting within the scope and course of their duties and employment, were driving the Ford station wagon owned by appellant in a southerly direction on their

right side of the road, and approached the place of the accident behind the Ford sedan automobile driven by appellee, Ernest J. Uarte.

There was evidence that in spite of the darkness and the rain and the slippery and treacherous condition of the highway, the station wagon was being driven at a high and negligent rate of speed in the neighborhood of 70 or 80 miles per hour (see Section II, *infra*).

Suddenly, appellee's Ford sedan automobile swung sharply and almost at right angles to the left across the highway and onto the east shoulder, and then southwest again, striking the Golden State Company tractor at the right front wheel and fender.

The impact of this collision spun the steering wheel of the tractor, and it went out of control and across the highway to the left where it was struck by appellant's Ford station wagon.

The positions of the vehicles and their relationship to each other upon the roadway after the accident is demonstrated by diagrams made by the highway patrol, and by photographs taken by the highway patrol, which appear in evidence as Plaintiff's Exhibits 13 and 2 to 12.

Richard Francis Rogers and Roger Davis Green were killed. Ernest J. Uarte received a fractured skull and brain concussion resulting in a complete amnesia as to the facts of the accident. No other witness saw the accident except Don Arthur McCoy, the driver of the truck, and his wife, who was riding in the truck but was unable to add anything additional to his testimony.

Therefore, it was for the trial court to determine, from the testimony of Don Arthur McCoy and the presumptions and reasonable inferences that could be drawn from the physical facts, what caused appellee's Ford sedan automobile to swing to the left side of the road and collide with the Golden State Company tractor.

The trial court heard the testimony, viewed the photographs, weighed the evidence and determined that the accident was caused by negligence on the part of the driver of appellant's station wagon without any negligence on the part of appellee, and upon this determination, rendered judgment in favor of appellee.

If there is any substantial evidence to support that judgment and the trial court did not commit error in the admission of evidence as complained of by appellant, the determination of the trial court is binding upon this honorable Court, and the judgment should be affirmed.

II.

BOTH THE JUDGMENT AND THE FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE.

Appellee testified at the trial, but as a result of his injuries, he had suffered a complete amnesia covering a period from his discharge from the army some seven months before the accident until he "woke up" in the hospital approximately thirty days after the accident (Tr. pp. 75 and 76). He remembered no facts of the accident (Tr. p. 75), and there was no other wit-

ness who could testify or did testify to any conduct on his part prior to or at the time of the accident which was irreconcilable with due care on his part.

Therefore, both under the law of California and under the federal decisions, it was presumed that appellee was free from negligence and that he exercised due care for his own safety; and in the absence of conclusive evidence to the contrary, the trial court was justified in finding according to the presumption.

Hoppe v. Bradshaw, 42 Cal. App. (2d) 334 at 339;

Durbrock v. Interstate Motor System, 143 F. (2d) 304;

Kriesak v. Crowe, 131 F. (2d) 1023;

Smellie v. Southern Pacific Company, 212 Cal. 540;

Westberg v. Willde, 14 Cal. (2d) 360;

Anthony v. Hobbie, 25 Cal. (2d) 814.

Therefore, the trial court in this case was entitled to presume and did presume that appellee was driving at a prudent rate of speed and otherwise was driving without negligence, and that his automobile went onto the left side of the highway without negligence on his part.

The most that appellant may say in this connection is that there was conflicting evidence from which the trial court might have reached a conclusion to the contrary, but even if this were conceded (which it is not), that conflict was resolved by the trial court against appellant.

On the other hand, there was substantial evidence from which the trial court was entitled to determine, and did determine, that the station wagon was traveling at a speed that was negligent under the circumstances, and that due to that speed and the negligent conduct of the driver in attempting to pass appellee's automobile at that speed on a wet, slippery highway, with the Golden State Company truck approaching from the opposite direction and only 50 feet away, the station wagon struck the left rear fender and wheel of appellee's automobile, blowing his left rear tire, and causing the automobile to careen across the highway and into the truck, as was described by the witness Don Arthur McCoy.

The pavement was 22 feet wide with room for only two vehicles to pass on the pavement in opposite directions (Tr. p. 30).

It was the first rain of the season and the pavement was wet, slippery and treacherous (Tr. pp. 63, 96, 108 and 122).

At a point 10 or 11 miles north of the place of the accident, the station wagon passed the witness Allen Thomas Roberts (Tr. p. 95), travelling "wide open" at a speed of from 70 to 80 miles per hour (Tr. pp. 95 and 96). As it passed on the slippery pavement, the back wheels failed to trail but "slid" and "skidded" (Tr. p. 97). The witness drove on to the scene of the accident at an estimated speed of 40 miles per hour (Tr. p. 97). At this rate of speed, it took his approximately 16½ minutes to cover that distance of 11 miles,

and by that time the accident had occurred, 20 or 25 automobiles had gathered at the scene of the accident (some 8 or 10 of which were headed south and must have been passed by the station wagon although the normal flow of traffic was moving at 35 or 40 miles an hour (Tr. p. 112)), and the truck driver had completed putting out flares (Tr. pp. 100 and 101). The putting out of flares took an estimated 10 minutes (Tr. pp. 113 and 114). Thus, according to the best estimates of the witnesses, the station wagon travelled the last 11 miles preceding the accident in less than half the time required by the witness. Mathematically calculated, it covered the distance in approximately $6\frac{1}{2}$ minutes, or at an average speed of approximately 100 miles per hour.

Of course, it was the duty of the trial court to weigh this evidence in the light of reason, and since the trial court unquestionably realized, as does this Court, that any conclusion as to speed which is the result of mathematical calculations based upon estimates of time and distance can be no more accurate than the estimates upon which they are based, and that even a slight inaccuracy in an estimate may substantially change the whole result, it is doubtful if the trial court determined that the station wagon was actually travelling 100 miles per hour. But the trial court was entitled to infer from this testimony that the speed of the station wagon was not decreased after it passed the witness Roberts and at the time of the accident it was travelling at from 70 to 80 miles per hour.

This conclusion was corroborated by the testimony of the witness W. R. Daniels, who testified that the station wagon passed him some 4 or 5 miles north of the accident (Tr. p. 108), and that it was then traveling at the same speed at which it passed the witness Roberts, to-wit, 70 to 80 miles per hour (Tr. p. 110). At that point, which was on an "S" turn, the station wagon passed over a double white line in violation of law (California Vehicle Code, Section 525(b)), and in order to avoid a vehicle coming from the opposite direction, cut in front of the witness and behind another vehicle which was travelling in the same direction as the witness less than 300 feet ahead (Tr. pp. 109 to 111). When the station wagon again accelerated to pass the vehicle ahead, the driver "used so much throttle, he spun his wheels and there was a spray, it was like steam, spinning his wheels" (Tr. p. 112). The witness Daniels continued on to the scene of the accident and arrived there in an estimated time of 5 or 6 minutes (Tr. p. 118). By that time, the accident had occurred and enough time had elapsed for a number of other vehicles to have gathered at the scene (Tr. p. 112).

The conclusion of the trial court as to the speed of the station wagon is also supported by the reasonable inference permitted from the photographs of its condition after the accident (Plaintiff's Exhibits 2 and 5). When it is remembered that the station wagon struck the truck on the right front side after the truck had been involved in the accident with the Ford sedan and was swinging to the left at almost right angles

across the highway, and that the impact of this collision was greater than the first head-on collision with the Ford sedan (Tr. p. 139) and of sufficient force to kill both of the occupants, do the damage shown in the photographs, and spin the station wagon around and back so that it came to rest over 40 feet north of the point of impact (Plaintiff's Exhibit 13), the speed with which the station wagon struck the truck must have been nothing less than that described by the witness Daniels as "terrific" (Tr. p. 110).

Appellant states at page 12 of its brief that the highway speed at the point of the accident was 55 miles per hour. This is not an accurate statement. Section 510 of the California Vehicle Code provides as a basic speed law that "no person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property". The speed of 55 miles per hour referred to by appellant is only a *prima facie* speed limit which fixes the burden of proving that any certain speed is or is not in excess of the basic speed limit (Vehicle Code, Section 511), and surely appellant does not mean to argue that a speed of 55 miles an hour under the conditions existing at the time and place of this accident was a reasonable or prudent speed.

As before stated, Don Arthur McCoy, the driver of the truck, was the only witness who could testify directly to conduct on the part of any driver immedi-

ately before the accident. Don Arthur McCoy testified as follows:

Don Arthur McCoy was driving the truck, semi-trailer and trailer at approximately 40 miles an hour on the right half of the highway (Tr. p. 122). He first saw the lights of the Uarte Ford sedan (Tr. p. 125) approaching some 250 yards or 750 feet away, and at that time he also saw the lights of the station wagon following behind with "some distance" between them (Tr. p. 123). He could not estimate the speed (Tr. p. 124).

Because McCoy could only see the lights, he could not say definitely that the station wagon came abreast of the Uarte automobile, but he did testify that as the lights came closer, the second set of lights was "blackened out" (Tr. p. 124), and then when the Uarte automobile was approximately 50 feet north of him (Tr. p. 125), the second set of lights again came into view, at which time the two vehicles were very close together, in fact so close that while the witness could then see all four lights (Tr. p. 148), they both "seemed as one" and they "seemed to bunch and jump" (Tr. pp. 130 and 131), and at that instant the Uarte automobile, which before that had been travelling on the right side of the highway and had not swerved or swayed or zig-zagged or in any way deviated from a straight course (Tr. p. 143), suddenly swerved across the highway to the left at almost a right angle to the highway (Plaintiff's Exhibit 14; Tr. pp. 125 and 133).

As the Uarte automobile crossed in front of the truck and across the path of the truck's headlights, McCoy could see Uarte sitting up alert in the seat, frantically pulling at the steering wheel in an attempt to hold the automobile under control and get it back on the right side of the highway (Tr. pp. 125 and 144).

The course taken by the Uarte automobile was drawn by the witness McCoy upon a diagram which is in evidence as Plaintiff's Exhibit 14. The course of the automobile was marked with the letters M3, M2 and M1, and Don Arthur McCoy testified that the Uarte automobile "just seemed to fairly jump out there" (Tr. pp. 132 and 133), with the rear end skidding ahead of and further than the front so that when the automobile reached the most easterly point in its course, the rear end was off of the pavement and the front end on the pavement and the automobile facing in a southwesterly direction, from where it proceeded into the right front of the Golden State Company truck (Plaintiff's Exhibit 14; Tr. pp. 125, 126 and 166).

The photograph of the Uarte automobile taken by the highway patrol immediately after the accident (Plaintiff's Exhibit 3) demonstrates that the *left rear fender and corner* were severely damaged although the collision between that automobile and the truck involved the *right front corner* of the automobile and the right front corner of the truck.

The witness Ceferino Layana, who was asleep in the Uarte automobile, testified that he was suddenly awakened by a "kind of jerk or something", and that

this was before the collision with the truck (Tr. p. 176).

From the above, and without any further testimony upon the subject from the witness Don Arthur McCoy, it was reasonable for the court to have drawn the inference that the Uarte automobile had been struck or "clipped" from behind on the left rear fender and wheel as the station wagon attempted to pass the Uarte automobile without sufficient clearance between the Uarte automobile and the approaching Golden State Company truck. However, Don Arthur McCoy testified as follows:

"Q. And will you state to the Court now what the impression was that you got, what appeared to you to happen there?

A. This was what appeared to me, your Honor, it is an assumption, it is a conclusion that I came to, was that——

Mr. McKnight: Just a minute.

The Court: No.

The Witness: Well, the statement——

Q. By Mr. McKnight: It is your impression from what you saw?

A. Yes, sir, that is right; the impression, that is what I mean, yes, sir.

Q. All right.

A. The impression that I got at that time was that the car either skidded or was clipped.

The Court: Or was clipped?

The Witness: Yes, sir."

(Tr. p. 129.)

"Q. By Mr. McKnight: And there was sufficient so it appeared to you that one of them had clipped the other one?

A. Well, something happened. I don't know what happened.

Q. Well, to refresh your memory, I will ask you if these questions were asked you and these answers were made by you to the District Attorney on the night of the accident, for the purpose of again refreshing your memory:

'Q. Do you have the impression that these cars coming towards you were abreast at the time you approached them?

A. Well, I would really rather not say. I couldn't hardly make a statement, but they were awfully close together. They were just like one.

Q. You aren't able to say whether they were abreast, or whether one was passing the other?

A. No.

Q. Can you say this: both appeared to be in the southbound lane together, coming toward you?

A. It appears to me that *one clipped the other and threw him there*, or one blew a tire, or something.

Q. As this car swerved toward you, the Ford Sedan that hit you first, did it turn suddenly toward you, or gradually turn toward you?

A. It pulled right into me. It just seemed to fairly jump out there. That is the reason that I thought he *got clipped* or blew a tire. It seemed like he was on one side and right now he was over there.'

Do you remember those statements?

A. Yes, sir.

The Court: *Are those true?*

The Witness: *To the best of my knowledge, yes, sir."*

(Tr. pp. 132 and 133.)

“The Court: *To the best of your recollection, was the leading car clipped from the rear or from the front?*

The Witness: Well, I wouldn't say—from the rear.

The Court: From the rear?

The Witness: *The leading car was clipped.*

The Court: Clipped from the rear.

The Witness: *If it was clipped, it would be——*

The Court: Well, that is your recollection?

The Witness: *Yes. It was either clipped or he blew a tire, your Honor, something that caused him to go across there.”*

(Tr. p. 134.)

“Q. And you also stated in answer to counsel's question that your statement to the District Attorney and here in Court that the rear vehicle appeared to clip the other vehicle was based—was a pure—was a conclusion. That conclusion or impression, or whatever you want to call it, was based on what you saw there, then, that night, wasn't it?

A. It was based on the actions of the Uarte car.

Q. And also on the actions of the other car when you saw the two lights bunched together and then one start skidding, wasn't it?

A. Yes, sir.”

(Tr. pp. 164 and 165.)

“The Court: *Have you seen other cars clipped?*

The Witness: *Yes; yes, I have, lots of times.*

The Court: *Have you seen other cars blow tires?*

The Witness: *Yes, sir.*

The Court: Do they always act the same?

The Witness: Sometimes they act the same, yes, they do.

The Court: Generally?

The Witness: Generally.

The Court: *This car acted like it was either clipped or blew a tire?*

The Witness: *Yes, sir.*

Q. By Mr. Deutz: I would like to ask you a question: Mr. McCoy, from your experience—How long have you driven trucks or automobiles?

A. 20 years.

Q. For 20 years, and you have driven them in all types of weather?

A. Yes, sir."

(Tr. pp. 157 and 158.)

Appellant argues that this testimony has no probative force because it constituted only an opinion or conclusion of the witness, and the United States attorney did lead the witness into saying that it was only a conclusion (Tr. p. 157).

However, this Court must remember that the examination of the witness McCoy was in the nature of cross-examination under Rule 43(b) of the Federal Rules of Civil Procedure. On several occasions, the witness refused to answer questions on the ground that he did not remember or know a fact, and it was necessary for appellee's counsel to refresh his memory by the use of statements previously made by him in order to get any testimony upon the subject, and, under these circumstances, appellee's attorney was

entitled to more leniency from the court in conducting that examination then would have been justified in a case of a completely and fully cooperative witness.

Moreover, the statements complained of were not actually the opinions of the witness but an attempt on the part of the witness to describe in his own words what he had actually seen. In 32 *Corpus Juris Secundum* at pages 144 and 151, it is said:

“It frequently occurs that the constituent impressions received from observation of an occurrence or condition are so subtle, so interwoven, so transitory and evanescent, or so numerous that their proper presentation to, or suitable coordination by, the jury is practically impossible; and under such circumstances the observing witness is permitted to state his inference or conclusion, for the reason that such a statement is the only method of conveying to the jury the effect on his mind of what was observed by him.”

* * * * *

“A competent witness may state in the form of an inference the cause of a certain occurrence or phenomenon, as for instance *the cause of a personal or property injury, sickness, death, or accident*. It merely reverses the statement to say that a witness may equally well infer that given phenomena are the effect of a designated cause, or what has been the effect of such cause, and under what conditions it will manifest its existence.”

This rule is recognized in California and by all text writers upon the subject. In *Manney v. Housing Authority*, 79 Cal. App. (2d) 453 at 459, it is said:

“The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. (10 Cal. Jur., Evidence, Section 236, pp. 978-980; 7 Wigmore on Evidence, 3d ed., Section 1924, pp. 22-23; Jones on Evidence, 3d ed., Section 360, p. 542 et seq.; 1 Greenleaf on Evidence, 16th ed., Section 441(b), p. 550; 20 Am. Jur., Evidence, Section 769, p. 540; 32 C.J.S., Evidence, Section 444, p. 73, Section 485, p. 144.)”

Again in *Healy v. Visalia R. R. Co.*, 101 Cal. 585 at 589, it is said:

“The general rule is that the testimony of a witness shall be limited to the facts of which he has a personal knowledge, and that he shall not give his individual opinion thereon; *but in many instances the opinion of a witness may be received in connection with his statement of the facts upon which it is based.* The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. *Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words,* nor do they affect every individual alike, and the judgment or opinion of the witnesses by whom they have been experienced is the only mode by which they can be presented to a jury.”

In *Dean v. Feld*, 77 Cal. App. (2d) 327 at 330, it is said:

“ ‘*Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do they affect every individual alike, and the judgment or opinion of the witnesses, by whom they have been experienced is the only mode by which they can be presented to a jury.*’ . . . A witness is not required to testify with that degree of certainty which excludes all doubt from his mind. . . . *That which is reasonably descriptive of a car in action is proper.*”

See also:

Fred J. Kiesel & Co. v. Sun Insurance, 88 F. 243;

Corrigan v. U. S., 82 F. (2d) 106.

It is true that the witness McCoy stated that he did not see any contact between the station wagon and the Uarte automobile, and of course it was impossible for him to have actually seen any such contact, because at that time all he could see was the lights of the two vehicles which were shining directly into his eyes (Tr. p. 164), but, as an experienced truck driver who had witnessed such accidents many times before, he did obtain a definite impression of what had happened from what he did actually see, and the witness was describing what he saw in the most descriptive language at his disposal.

Appellant also complains that since the witness McCoy testified in the alternative that the Uarte automobile was either clipped or blew a tire, the trial court was not justified in finding in favor of either

one of those alternatives as against the other. But, in this connection, it is clear that it was for the trial court to determine whether the automobile went out of control because it was clipped or because it blew a tire, or whether both alternatives took place and the automobile blew a tire as a result of being clipped, and appellant ignores the fact that the witness Peter Badostain testified that before the accident all of the tires were good (Tr. p. 174) and the witness McCoy testified in effect that there was nothing in appellee's driving of the automobile which should have caused a tire to blow without an impact with some other object (Tr. p. 149), and that the trial court made its decision, not upon any one statement of any witness, but from all of the evidence in the case.

In any event, the record discloses that at the time of trial no objection was made by the United States attorney to any of the evidence above quoted. It is true that a motion to strike was made in connection with the one particular question and answer found at page 129 of the transcript, but that motion did not go to any other of the testimony quoted, and it is a well-settled rule of law that even where testimony would be inadmissible if the proper objection were made, where it is received without objection, it constitutes evidence in the case and will support a judgment based upon it.

Abbott v. Limited Mutual Compensation Insurance Company, 30 Cal. App. (2d) 157 at 163;

People v. One Ford VS Coach, 21 Cal. App. (2d) 445 at 448;
Parsons v. Easton, 184 Cal. 764 at 769;
Clark v. McNeil, 25 F. (2d) 247 at 250.

It is also true that appellant attempted to convince the trial court that the damage to the left rear corner and fender of the Uarte automobile was caused by a third impact between the Uarte automobile and the rear of the semi-trailer, and appellant attempted to support this argument with testimony that on the left rear of the Uarte automobile above the fender there was found what appeared to be cream colored paint, and that the Golden State Company semi-trailer was painted cream (Appellant's Opening Brief, p. 12). However, it was the function of the trial court to believe or disbelieve that testimony and to interpret it, and since it appeared in the evidence that a part of the body of the station wagon was a "bleached white" or "egg-yolk yellow" (Tr. pp. 260 and 261), and since the witness Don Arthur McCoy, who described the paint smear on the Uarte automobile, also testified that he was unable to determine how it got there or whether it was actually paint from an outside source or simply the undercoating on the vehicle itself, or whether or not it was the same paint as was on the semi-trailer (Tr. pp. 166, 167 and 153), and since at the time of the impact between the Uarte automobile and the truck, the left rear of that automobile was on the opposite side from the point of impact (Tr. p. 166), and since the third impact to which

appellant refers came *after* the second impact between the station wagon and the trailer (Tr. p. 156), at which time the trailer was more than 100 feet north of the gouge marks which represented the location of the first impact between the truck and the Uarte automobile (Tr. p. 142; Plaintiff's Exhibit 13) and over 90 feet north of the point where the Uarte automobile came to rest (Plaintiff's Exhibit 13), it is clear why the trial court in the exercise of sound judgment could not accept appellant's theory upon this subject and was well within the limits of judicial discretion in determining that the damage to the left rear of the Uarte automobile was caused by an impact from the station wagon, which in turn caused the Uarte automobile to go out of control and cross the highway, and to collide with the truck.

The impact of the collision between the Uarte automobile and the truck caused McCoy to lose control of his equipment, the steering wheel spun, and the truck went across the highway to the left where it was struck by appellant's station wagon (Tr. pp. 137 to 139). The two collisions were almost instantaneous and not more than a second apart (Tr. pp. 137 and 138), and the second impact between the station wagon and the truck was more severe than the first impact between the Uarte automobile and the truck (Tr. pp. 139 and 156).

The tractor and semi-trailer came to rest on the west shoulder of the highway with the trailer across the southbound lane of traffic over 100 feet north of

the gouge marks which marked the point of impact (Plaintiff's Exhibit 13; Tr. p. 142).

The Uarte automobile came to rest on the east shoulder 33 feet northeast of the point of impact and 93 feet and 10 inches south of where the trailer came to rest (Plaintiff's Exhibit 13).

The station wagon came to rest in the southbound lane of traffic 40 feet and 8 inches north of the trailer (Plaintiff's Exhibit 13).

In view of all of the above and of the established rule that all conflicts and reasonable inferences shall be resolved in favor of the judgment, it is difficult to understand appellant's argument that the evidence was insufficient to support the findings and the judgment of the Court.

III.

THE COURT DID NOT ERR IN RECEIVING EVIDENCE OF SPEED.

The first error of law urged by appellant is that the Court erred in admitting evidence of the speed of the Government station wagon at a point 10 to 11 miles from the scene of the accident and at a point 4 to 5 miles from the scene of the accident.

Appellant first cites *Blashfield, Cyclopedia of Automobile Law and Practice*, Section 6176, to the effect that evidence of conditions remote in time and distance from the time and place of the accident is in-

admissible. But, in the same section of the text, it is said:

“Collisions often result from the racing of cars, and evidence is admissible to show racing, but evidence of speeding and racing between two cars upon the road may be so remote in time and distance as not to be admissible in evidence, *and whether it is such in a given case rests in the sound discretion of the court, . . .*”

To demonstrate that this is the correct rule, both in the Federal courts and in the California courts, and that it is for the trial court to determine in each case under all of the circumstances and evidence whether or not the testimony offered is too remote to have probative value, this Court need only refer to the authorities cited in appellant's brief.

In *Dromey v. Interstate Motor Freight Service*, 121 F. (2d) 361, cited by appellant, evidence of the speed of the defendant's automobile “several miles” from the accident, and again a mile and a half from the accident, was admitted, and the trial court said:

“Appellants vigorously assail the introduction of what they call highly prejudicial evidence regarding the speed with which the Kuczyk car was being driven. This testimony was given by four boys who stated that they had raced the latter car *for several miles* until they reached a point about a mile and a half south of the scene of the accident where they turned off Sheridan Road. They all testified that Kuczyk was driving at a speed of from 65 to 70 miles an hour with the exception of a few blocks within the city limits

of Zion where both cars slowed down. This evidence of speed was corroborated by that of two other witnesses, one of whom said that, at a point about *a mile and a half* south of the accident, the Kuczyk car passed the car in which they were driving, going at a speed of about 70 to 80 miles an hour, and the other, that it was going 'terribly fast.' Mrs. Davis and her son also testified that the Kuczyk car went by, 'like a flash' and 'like a skyrocket.' The truck driver also estimated the speed at which Kuczyk was driving at about 70 miles an hour. *We think this corroborative evidence tends to prove the continuity of the excessive speed of the Kuczyk car up to the point of the accident*, thus rendering inapplicable a case relied upon by appellants to show the inadmissibility of evidence of speed not proved to have continued up to the place of the accident."

In *Melville v. State of Maryland*, 155 F. (2d) 440, evidence of the squealing of tires as the defendant's truck rounded a curve at least 9 miles from the place of the accident, and the testimony of another witness that some 300 yards from the scene of the accident, the defendant failed to dim his lights and was straddling the painted center line of the road, causing the witness to "hit the dirt", and that the speed of the defendant's truck at that time was in excess of 45 miles per hour, was admitted in evidence, and the court said:

"Appellant next objects to the rulings of the trial court in admitting the testimony of the witnesses, Bowden, Davis and Williams.

“Bowden testified that at 11:15 p. m. on the night of the collision, he saw a Melville truck in Berlin (*at least nine miles from the place of the accident*), that he saw the occupants go into a beer tavern, that they came out soon thereafter and asked him the way to Cape Charles, *that he heard the tires of the truck squeal as it rounded a curve in Berlin. . . .*

“. . . The squealing of the tires may be somewhat remote, though it may tend to indicate the custom of the driver in taking curves.

* * * * *

“The much more important testimony of Davis as to the manner of operation of the Melville truck, when the Melville truck passed the truck driven by Davis approximately 300 yards from the scene of the accident seems clearly relevant and admissible. . . .

“Davis testified that he dimmed his lights, which the Melville truck failed to do. He testified that the Melville truck was hogging the road (that is, that it was too far to its left, straddling the painted centerline of the road) and that Davis was thereby compelled to hit the dirt (that is, Davis had to drive with his right hand wheels completely off the macadam and on the dirt shoulder). Davis further stated that the speed of the Melville truck was in excess of 45 miles per hour.”

Appellant treats as a leading case in California, *Pruitt v. Krovitz*, 59 Cal. App. (2d) 666, 139 P. (2d) 992, and in that case, the court reaffirmed the well-established rule that “the admission or rejection of

evidence as to the rate of speed a vehicle is travelling before a collision occurs rests in the sound discretion of the trial court," and that "the question rests so largely within its discretion that no fast or positive rule can be laid down governing the matter."

In discussing the point, appellant states that "in the cases where such evidence is allowed, there were additional factors other than the mere observance of speed at an isolated point not contiguous to the point of impact." Appellee again wishes to point out that there were such additional factors in the case at bar.

Not only did the two witnesses testify as to the speed of the station wagon at the points mentioned, but they also testified to facts leading to the inevitable inferences that this was a continuing rate of speed and did continue to the point of impact. As pointed out (with transcript references) in Section II of this brief, the witness Roberts testified to facts from which it could be determined that he drove from the point where the station wagon passed him to the scene of the accident at 40 miles an hour and that it took him more than twice as long to reach the scene of the accident as it took the station wagon, thus indicating that the station wagon continued on to the scene of the accident at at least twice that speed. This same fact could also be inferred by simple mathematical calculations based upon the speed at which the witness Roberts was travelling, the length of time it took him to reach the scene of the accident, and the period of time elapsing between the happening of the accident and the arrival of the witness Roberts at the accident.

The continuity of the speed of the station wagon was further demonstrated by the fact that when the station wagon passed the witness Daniels it was still travelling at the same speed at which it passed the witness Roberts, to-wit, 70 to 80 miles an hour, and by the reasonable inferences which could be drawn from the manner in which the accident happened and the condition of the station wagon after the accident indicating the terrific speed with which the station wagon struck the truck.

In addition to this, in line with some of the elements mentioned in the authorities cited by appellant, it was proved that the accident happened at night-time on a straight level State highway and not in the vicinity of any intersecting road, that the highway between the place where the station wagon passed the witness Roberts and the scene of the accident was protected by stop signs at the few crossroads which did intersect, and that there was nothing to slow down traffic in that distance (Tr. pp. 99 and 100).

In this connection, appellant cited 14 authorities where "evidence of speed was not allowed" and 12 authorities where "evidence of speed was allowed." The very citing of these authorities indicates that the admissibility of evidence in each case must depend upon that particular case, and a reading of all of those authorities will demonstrate that the matter is held to be within the discretion of the trial court and that the instances where the decision of the trial court upon the subject has been disturbed on appeal are extremely rare.

In 10 of the 14 cases cited by appellant where evidence of speed was not allowed, the decision of the trial court was actually affirmed, and it was simply held that where the trial court, under the particular circumstances of the case, exercised his discretion to exclude the evidence, it was not an abuse of discretion to do so, and in none of those cases was the continuity of the speed established as it was in the case at bar.

It should also be remembered that cases involving accidents upon city streets and at intersections, where the speed of a vehicle is normally increased and decreased within very short distances, present an entirely different picture from that presented in the case at bar.

In *Pruitt v. Krovitz*, 59 Cal. App. (2d) 666, cited by appellant, the accident happened at an obstructed intersection in the city of San Mateo, and the appellate court affirmed the decision of the trial court which received evidence of the speed of the defendant's automobile a block from the intersection, and, in so doing, stated that defendant's speed could be connected with the accident by the inferences which could be drawn from the condition of the automobile after the accident. The court said:

"Furthermore the location and condition of both cars following the collision fully supports the inference that appellant's car struck the coach while appellant was travelling at a high rate of speed."

Appellant also cites *Ackel v. American Creamery Co.*, 12 Cal. App. (2d) 672, 55 P. (2d) 1195. Again,

the accident in this case happened at a busy intersection in the city of Oakland, and the decision of the appellate court was only *to affirm the exercise of the trial court's discretion* in excluding evidence of speed some distance from the accident. In so doing, the court said:

“Had the trial court received the proffered evidence its weight would have been a matter for the jury.”

In *Gritsch v. Pickwick Stages System*, 27 Cal. App. (2d) 494, cited by appellant, it was held that even where the evidence of speed was too remote and should not have been admitted, its admission was not so prejudicial as to require a reversal of the judgment.

Other California authorities holding that the admissibility of such evidence is a matter for the trial court under all of the circumstances of each case are as follows:

Traynor v. McGilvray, 54 Cal. App. 31;

Lundgren v. Converse, 34 Cal. App. (2d) 445;

Ritchey v. Watson, 204 Cal. 387;

Mathews v. Dudley, 212 Cal. 58.

Appellee submits that the admission of the evidence in this case was a proper exercise of the trial court's discretion and did not constitute error.

IV.

THE COURT DID NOT ERR IN PERMITTING DON ARTHUR MCCOY TO BE EXAMINED AS AN UNWILLING OR HOSTILE WITNESS.

Rule 19(6) of the Rules of Practice of this Court requires that the appellant “*shall*, upon the filing of the record in this Court . . . file with the clerk a concise statement of the points on which he intends to rely on the appeal . . . and forthwith *serve* on the adverse party a copy of such statement.”

Rule 20(2-d) of the Rules of Practice of this Court requires that “when the error alleged is to the admission or rejection of evidence the specification of error (in appellant’s brief) shall quote the grounds urged at the trial for the objection . . . and refer to the page number in the printed or typewritten transcript where the same may be found.”

Appellant, at page 5 of its brief, sets forth as a specification of errors the following:

“(e) The Court erred in permitting Don McCoy to be called and examined as an adverse witness by the appellee under the provisions of Rule 43(b), F. R. C. P.

“(f) The Court erred in overruling the appellant’s objections to the appellee’s findings of fact.”

Pursuant to Rule 19, appellant did serve upon appellee a document entitled “Statement of Points on which Appellant Intends to Rely on Appeal,” but that document *omitted* specifications (e) and (f) above set

forth, and an examination of the records will disclose that the document now on file in the clerk's office from which the transcript in the case was made up, which does include those specifications, was *never served* upon appellee.

Appellant also violated Rule 20(2-d) in that appellant's brief does not quote or refer to any objection made by the United States attorney to the testimony of Don Arthur McCoy.

Appellee respectfully submits that for these reasons, this Court should not consider these specifications of error.

Appellee further submits that on the merits, these specifications of error must be rejected.

The presence of Don Arthur McCoy as a witness in the case was obtained by appellant, but due to the absence of any other eyewitness to the accident, appellee was required to examine the witness to establish his case. At the opening of the trial, appellee's attorney stated:

"Mr. McCoy, the driver of the truck, is not personally hostile. He is a gentleman in every way. He is an adverse party in another suit that is pending in the State Court. His employer is an adverse party in another suit. He is represented in the other case by his own counsel.

Mr. Deutz: You have to correct that, counsel. I don't believe they are adverse parties. I believe they are co-defendants.

Mr. McKnight: He is, according to the Supreme Court of California, an adverse party, but

in this case, I treat him as an adverse party because somebody caused it and each would like to have somebody else blamed, and the Supreme Court of the State of California has said that he is an adverse party.

The Court: He is adverse to everybody.

Mr. McKnight: He is adverse to everybody except to himself and his employer. He has been subpoenaed. He has come in at the request of the government, who actually wanted him also, but he is in a position, I think, of what Rule 43b intended as an unwilling and hostile witness, and it will be necessary to prove my case with that type of a witness, which makes it rather difficult, and I start this case knowing that" (Tr. pp. 36 and 37).

And, when Mr. McCoy was called to the witness stand, appellee's counsel stated:

"The Court: Very well. Call the next witness.

Mr. McKnight: Mr. McCoy. This witness is the witness I desire to call under Rule 43(b).

The Court: Well, he hasn't given an demonstration of hostility yet. I don't know. He may not.

* * * * *

Mr. Deutz: *Your Honor, I don't object to the reference to Section 43(b), but, he is calling him as his own witness and is bound by his testimony unless there is some showing of adversity.*

The Court: Well, let me see the rule. The bailiff or somebody will get me a copy of it. Will you see if you can get me the Rules of Civil Procedure?

* * * * *

Mr. McKnight: That is what I had in mind. This witness, your Honor please, was originally

a defendant in this suit. He has now been dismissed, and is not an adverse party in this suit. However, he is an adverse party, to-wit, a co-defendant in another action which has been filed in the Superior Court, which has been tried once, and which, in all probability, will be tried again—

The Court: In what Superior Court?

Mr. McKnight: Of Madera County.

The Court: Of Madera County.

Mr. McKnight: —having resulted in a non-suit as to one defendant and a hung jury as to the other defendant. He was represented by his own counsel.

I have not had full opportunity to discuss his testimony with him. True, I did see him this morning and talk to him for about a minute or two. Under those circumstances, I feel that his interests are different than ours and I would like the privilege of examining him under that Section, although Mr. McCoy has always been a gentleman and has showed no great impartiality to anyone so far in the case.

Mr. Deutz: I would like to point out, your honor, that in so far as Mr. McCoy's testimony is concerned, it has been clearly covered at the previous trial, so counsel for the plaintiff is not completely unaware of the testimony to be given in this case.

Mr. McKnight: Not if it is the same, your Honor.

The Court: I think under the rule it is permissible. It states a party may interrogate an unwilling or hostile witness by leading questions. There isn't any evidence of any hostility on the

part of this witness on this trial here. There isn't any controversion of the statement that he is yet a party to an action now pending against him arising out of the same incident which causes this action. The record shows that he was originally a party to this action, and the rule also permits the calling of an adverse party.

I think from the fact that he is a party to the action pending in the State Court, that the Court would be justified in indulging the presumption that he would be an unwilling witness, because unwillingness arises from a great many things, and it is natural that a person should be unwilling to take the witness stand and confess any error or commit any error on their part.

I think, moreover, that he can be cross examined under Rule 43 by virtue of the fact that he was a party to this action.

While it is true that a motion to dismiss was partially granted as to all defendants except the United States, and as to this defendant an order was made doing so, and while it is true that that is the law of this case, as far as this Court is concerned, because the ruling was made by another judge of this court, in this case, nevertheless, it is not beyond the realm of possibility that some higher court, by the time they get through with it, may put him back in as a party, and, in the meantime, the plaintiff in this case should not be deprived of a right which is given to him under the rule, and for that reason the motion is granted and the objections to it are overruled.

You may proceed under Rule 43(b)."
(Tr. pp. 118 to 121.)

It has been held that a co-defendant is subject to cross-examination as an adverse party:

Goehring v. Rogers, 67 Cal. App. 260 at 262.

Thus, the following appeared:

(1) Don Arthur McCoy and his employer had been defendants in this action, but had been dismissed on a question of jurisdiction.

(2) At the time of the trial in this case, Don Arthur McCoy and his employer technically were adverse parties in an action in Madera County arising out of the same accident.

(3) In the Madera County action, appellee and Don Arthur McCoy were not only adverse parties technically, but their interests were actually different since it was a defense to Don Arthur McCoy and his employer to prove that appellee was responsible for the accident.

(4) At the time of this trial, Don Arthur McCoy and his employer were represented in the Madera Court action by their own counsel.

(5) Don Arthur McCoy had been subpoenaed and brought to this trial at the request of the United States attorney, and appellee's counsel had had no opportunity to discuss his testimony with him.

Appellant states in its brief that the trial court "held McCoy to be an adverse party within the meaning of F. R. C. P. 43(b)" (Appellant's Brief, p. 21), but this is not true. The ruling of the trial court as above set forth did not permit the witness to be ex-

amined as an adverse party. The trial court did state that in permitting the witness to be examined under Rule 43(b) as an unwilling witness, he took into consideration the fact that he *had been* an adverse party in the case, but the trial court stated expressly that he was bound by the previous decision of another judge dismissing the action against McCoy, and his ruling was simply that appellee could proceed under Rule 43(b) (Tr. pp. 38, 120 and 121).

In this connection, the United States attorney told the trial court that he had no objection to the witness being called under that section.

“Mr. McKnight: Mr. McCoy. ‘This witness is the witness I desire to call under Rule 43(b).

* * * * *

Mr. Deutz: *Your Honor, I dont object to the reference to Section 43(b), but, he is calling him as his own witness and is bound by his testimony unless there is some showing of adversity.*”

The ruling was: “You may proceed under Rule 43(b).”

Rule 43(b), F. R. C. P., reads as follows:

“(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . .”

Thereafter, appellee did interrogate Don Arthur McCoy by leading questions as permitted by the rule

in the case of an unwilling witness, but appellee did not attempt to contradict and impeach him as an adverse party, and a reading of the entire testimony of Don Arthur McCoy will disclose that the witness was never impeached by appellee's attorney.

In fact, appellant's only present complaint in reference to the examination of Don Arthur McCoy is that the trial court permitted appellee to use the statement made by McCoy on the night of the accident (Appellant's Brief, p. 21), but in this connection the record discloses that the statement was not put in evidence, and was used by appellee, not as impeachment, but simply to refresh the witness's memory, which was permissible even in the absence of any application of Rule 43(b).

The statement was used four times. The first time it was used, appellee's attorney expressly asked the witness if the statement would refresh his memory upon a point upon which he was uncertain, and the witness stated that he believed it would. The witness was permitted to read the statement and stated that it did refresh his memory, and he then testified as to the fact (Tr. pp. 127 and 128). The second time, the statement was used by the trial court and was not a part of appellee's attorney's examination (Tr. pp. 130 and 131). The third time, appellee's attorney again stated that he was using the statement solely for the purpose of refreshing the witness's memory, and after a portion of the statement was read to him, the witness testified that he then remembered the facts and that they were true (Tr. pp.

132 and 133). The fourth time, the statement was used by the United States attorney himself (Tr. pp. 156 and 157).

The statement was originally authenticated for use in the case at the suggestion of the United States attorney and by stipulation of the parties (Tr. pp. 41 and 42), and in none of the instances above set forth where the statement was used, did the United States attorney make any objection to its use.

To summarize: The United States attorney expressly told the court that he did not object to the "reference" to Rule 43(b) so long as appellee called McCoy as his own witness and was bound by his testimony. Thereafter, appellee called McCoy as his own witness and examined him under Rule 43(b), but did not at any time attempt to contradict or impeach him under that rule as an adverse party. The only prejudice claimed by appellant is the use of a statement previously made by the witness to the District Attorney of Madera County, but that statement was originally authenticated for use at the suggestion of the United States attorney and appellee only used that statement to refresh the witness's memory, and the same statement was used by the United States attorney in his cross-examination of the same witness. At no time during the trial did the United States attorney make any objection to the examination of the witness upon the ground that the questions were leading or that appellee was impeaching his own witness, or upon any ground connected with Rule 43(b), and at no time did the United States attorney make

any objection to the use of the statement made to the District Attorney of Madera County.

Under these circumstances, there was no error in the ruling of the trial court or in the examination of the witness, and if there was any such error it was waived by the United States attorney, and in view of all of the other evidence in the case, could not possibly have resulted in prejudice requiring a reversal of the judgment.

V.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S OBJECTIONS TO THE FINDINGS OF FACT.

Throughout its brief, appellant has argued that the trial court's findings of fact were in error because they did not correspond in all ways with the informal discussion between the trial court and the United States attorney at the close of the case.

Appellee submits that if the findings of fact are supported by the evidence in the case, the trial court did not commit error in this connection, regardless of any discussion prior to the signing of the findings of fact.

However, the trial court did not in his discussion with the United States attorney announce any specific finding of fact or confine himself to any particular theory as to how the accident happened. Most of that discussion took place when the United States attorney was arguing for a dismissal of the action

upon the ground of the insufficiency of the evidence, and the trial court was simply explaining to the United States attorney that there were various inferences which he might draw from the evidence which would require him to deny the motion. Other statements were made in answer to the United States attorney's claim that there was only one theory, to-wit, his own, which the trial court could accept under the evidence. The position of the trial court in this respect was made completely clear when the trial court overruled appellant's objections to the proposed findings and stated as follows:

“The colloquy with counsel on argument at the conclusion of the trial and the court's observation at that time were not intended to be a resume of the evidence or the postulation of any ‘theory’. The Court's remarks were intended to be more than its conclusion that, from all of the evidence in the whole case and considering the witnesses, their interests, their manner of testifying and under all the other rules for weighing evidence, the evidence preponderated to show that the driver of the station wagon was negligent, and that such negligence was the proximate cause of the accident, without any contributory negligence on the part of the plaintiff or the driver of the truck vehicle which was involved in the accident.

“The objections to the proposed findings are overruled.”

(Tr. pp. 18 and 19.)

Findings of fact will not be set aside unless clearly erroneous, and due regard shall be given to the op-

portunity of the trial court to judge of the credibility of the witnesses (new Federal Rules, Rule No. 52).

The findings of fact and the conclusions of law are amply supported by the evidence and there was no error in connection therewith.

VI.

CONCLUSION.

Appellee submits that the judgment should be affirmed.

Dated, Fresno, California,
January 24, 1949.

Respectfully submitted,
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W. H. STAMMER,
GALEN McKNIGHT,
Attorneys for Appellee.

No. 12042

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ERNEST J. UARTE,

Appellee.

APPELLANT'S REPLY BRIEF.

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UNITED STATES OF AMERICA,

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vs.

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Appellee.

APPELLANT'S REPLY BRIEF.

I.

The Findings of Fact Are Unsupported By the Evidence.

The appellee (Brief p. 5) relies on a presumption that appellee was free from negligence and that he exercised due care for his own safety. The appellant is entitled to the same presumption until it is outweighed by evidence of negligence. The burden of proof in this regard rested, at trial, with the plaintiff. The appellant contends that the record clearly shows that the plaintiff-appellee failed to meet this burden.

Appellee contends (Brief p. 6) that the government vehicle attempted to pass the appellee's vehicle and in doing so struck the left rear fender and wheel of appellee's au-

tomobile, blowing his left rear tire, and causing the automobile to careen across the highway. This is not in accord with the evidence. The photograph of the left rear of appellee's car [Ex. 3] shows that a considerable impact took place at that point which appellee would like to attribute to a blow from appellant's car. However, when this impact allegedly occurred, the two passengers in appellee's car were unaware of it. After considerable prodding, witness Ceferino Layana testified that he was awakened by a "kind of jerk or something" [Brief p. 11 and Tr. p. 176; witness impeached on this, Tr. p. 177], and witness Peter Badostain was not even awakened until the crash into the Golden State truck [Tr. p. 172]. Obviously then, the severe impact to the left rear fender and puncture of that tire could hardly have taken place without awakening the sleeping occupants of the car. Furthermore, there is positive proof that the damage to the left rear of appellee's car was caused by an impact against the side of the Golden State truck, because the truck was damaged at that point and the left rear of appellee's car bore distinct paint marks of the color of the Golden State vehicle [Tr. pp. 256, 257, 266, 272 and 153], and no traces of the paint color of the appellant's vehicle [Tr. p. 269]. The appellant's car likewise showed no traces of the green color of appellee's car [Tr. p. 259].

In addition, the testimony and the physical facts dispute this theory of the appellee. Had the government car cut in on the left rear of appellee's car, as contended, the force of the blow would have propelled the rear of appellee's car to the right and causing that car to spin counter-clockwise and thereby causing the front of the car to approach the opposite shoulder of the road first in the course of its skid. The testimony was, however, that

appellee's car was spinning clockwise and that the rear of the vehicle reached the opposite shoulder of the road first [Tr. pp. 125, 126 and 166]. For this to occur, the appellee's car would have to have been hit by the government car on its *right* rear fender. This is not contended by appellee and has no support whatsoever in the proof.

The inferences as to speed set forth on pages 6 and 7 of appellee's brief can hardly be considered evidence especially in view of the fact that the accident occurred less than 3 miles north of Madera, on the main inland coastal highway, where side roads and road-side businesses would alter the flow and speed of traffic. The further inference as to speed set forth on pages 8 and 9 of appellee's brief in regard to the relative force of impact between appellee's car and the truck and appellant's car and the truck should be disregarded in light of clear and undisputed evidence that appellee's car hit a glancing blow in passing and that appellant's car hit head-on and was thrown back.

Appellee's challenge of the highway speed of 55 miles, under wet conditions, and his assertion that 55 miles per hour was unreasonable and imprudent is not based on any fact or testimony. Furthermore, one of appellee's passengers, Peter Badostain, placed appellee's speed "around 50 miles an hour" [Tr. p. 171]. Presumably then, appellee was also imprudent.

Appellee, at page 10 of his brief, places considerable emphasis on Don McCoy's testimony as to lights. This has been discussed at length in appellant's opening brief but it should be noted that the bunching of headlights could have appeared when appellee began to skid, even though not hit by appellant's car, because the swerving to the left of the rear of appellee's car [Tr. pp. 125, 126 and 166], would have momentarily brought the following

headlights into view along with those of appellee's car. Furthermore, the time lapse between appellee's striking the truck and causing the truck to jackknife across the road, and the time of impact between appellant's car and the truck, indicates that the appellant's car was a short but cognizable distance in the rear of appellee's car at all times.

Appellee dwells (Brief pp. 12-19) on the statements of McCoy that "one clipped the other and threw him there, or one blew a tire, or something." The testimony on this point is repetitious but this appellant believes that the transcript of *McCoy's testimony should be read as a whole*. The Court will then see that McCoy was uncertain as to what happened and that he, by his own admission, made a guess as to what took place. The acknowledgment of the above statement was forced on the witness by leading questions and the so-called "refreshing" of memory. The course of the testimony showed that McCoy has disavowed his admitted guess, made the night of the accident, as to what occurred and only testified to it when he had the record of his statement, made the night of the accident, forced upon him [Tr. pp. 130, 131, 132 and 133]. His memory did not require refreshing as he had made statements to all the numerous parties to this action and the Madera action and had only shortly before testified in the Madera trial.

Authority is cited (Appellee's Brief pp. 16, 17) to the effect that a witness may state impressions. This is not challenged. However, it should be noted that *at no time did McCoy say appellee was "clipped" unless he included that as only one of several alternatives, to-wit, "swerved," "blew a tire," "or something."*

Counsel for appellee is in error as to his reference on page 18 of his brief to alleged testimony [Tr. p. 164]

that McCoy had the lights of the approaching vehicles shining directly in his eyes. No such statement is found at page 164 of the Transcript or elsewhere in the testimony. The direct contrary was testified to by McCoy [Tr. p. 155].

At page 19 of appellant's brief testimony is attributed to McCoy [Tr. p. 149] to the effect that there was nothing in appellee's driving which should have caused a tire to blow without an impact with some other object. *Page 149 of the Transcript contains no testimony even remotely close to this statement.*

Also at page 19 appellee refers to lack of objection to McCoy's testimony by appellant. One motion to strike was made and denied but *appellant has not specified as error the admission of this testimony of McCoy*, except for the use of Rule 43(b), *but has merely pointed out that it is all clearly conclusion and guesswork and not evidentiary.*

This Honorable Court should note that even the trial judge acknowledged the weaknesses of McCoy's testimony when he said [Tr. p. 297], *"I wasn't very much impressed with the variety of McCoy's testimony. I don't think he knew which car came across there and hit him first."* (Emphasis added.)

The reference on page 20 of appellee's brief to paint on the government car as "egg-yolk yellow," in order to create an impression that it was that paint which was found on the left rear of the appellee's car, is a distortion of the testimony in that it was clearly stated, and the Court can almost take judicial notice of the fact, that Navy station wagons have blue or gray bodies and natural wood upper bodies covered with a colorless lacquer [Tr. p. 279].

Appellee's summation and theory of the accident have been sufficiently treated in appellant's opening brief and will not be further reviewed here, but it should be noted that following appellee's theory that the point of impact between appellee's car and truck was at a point 100 feet south of where the truck came to rest, and coupling that with the known fact that the appellant's car wound up 40 feet *north* of the truck, it is again obvious that the time between impacts was such that had appellant's car been travelling at the speed alleged it would have gone by without harm before the truck jackknifed, *unless it was far enough behind appellee to allow appellee's allegedly slower travelling vehicle to precede him, strike the truck, and have 57 feet of truck do a complete jackknife across the highway* before appellant's car hit the truck.

II.

Evidence of Speed.

Appellee and appellant are not at issue on the basic legal doctrines on the admissibility of evidence of speed. Both acknowledge that the trial court has considerable discretion in allowing evidence of speed. Appellant contends however, that *the trial court abused this discretion in the present case.*

It should be noted that the two witnesses as to speed, Roberts and Daniels, could not positively identify the car that passed them as the car involved in the wreck except to state that the car that passed them was blue and had the words "Navy" or "Navy Recruiting" on it [Tr. pp. 102, 103 and 116]. Witness Roberts admitted that in July of 1946 a considerable number of Navy station wagons were on the road in this section of the state. The bodies were not identified as those of the per-

sons seen in the station wagon that passed them [Tr. p. 103].

The appellee would liken the present case to *Dromey v. Interstate Motor Freight Service* (Appellee's Brief p. 23). Actually the situation there was quite different. In that case the cars raced for a number of miles and the car in question was shown to have been going 70 to 80 miles per hour within a mile and a half of the scene of the accident.

In *Melville v. State of Maryland*, quoted by appellee at length (Appellee's Brief pp. 24, 25), the Court indicated the conduct of the car at 9 miles was remote but it was not prejudicial because there was direct evidence of speed at *only 300 yards* from the scene of the accident.

In the present case, the testimony as to speed at 10 miles and at 5 miles referred to isolated instances. Furthermore, *this speed was noted only as the witness' car was passed by the other car*, and only for a distance of a few yards due to the darkness of the night. Anyone who has driven a car on a heavily traveled *two-lane* highway will recognize the fact that passing cars use much greater bursts of speed in passing so as to make the best possible use of openings in traffic before the oncoming traffic on the narrow road closes the gap. This is especially true at night when it is difficult to measure the distance to oncoming traffic and one usually uses more speed than necessary in order to be sure to get past and not be in danger of a head-on collision. It is therefore submitted that the fact that the testimony covered *passing speed* and *not travelling speed* is important on the question of remoteness.

From 5 miles out to the scene of the accident, there is *no evidence of speed*. McCoy could not estimate the speed

[Tr. p. 124]. No one else saw the cars. Appellee places great weight on his so-called mathematical deductions (Brief pp. 6, 7, 26, 27) from elapsed time (a highly uncertain calculation in light of the human inability to recollect a lapse of time accurately), even though he admits that the result of his calculations would have the government vehicle *averaging* 100 miles an hour for some period of time. It is submitted that this theorizing is not only not evidence but offends one's common sense.

The witness Roberts [Tr. pp. 99, 100] did not say that there was nothing to slow down traffic from 5 miles out to the scene of the accident, as appellee states, but said [Tr. p. 99] "there were intersections and everything. However, there was nothing to cause *me* to slow down." (Emphasis added.) This was the main highway in one of its narrowest sections and there were intersections and other traffic impediments as shown in the statement quoted above. It is submitted therefore that appellee's reference to this point (Brief p. 27) is a misstatement of the facts.

The damage to the government car is *not* a criterion as to speed. As pointed out in I above, and in the opening brief, the government car could have sustained just as much damage at 50 miles an hour as at 70 miles an hour when the road was slick and the collision was head-on. The relative damage compared with appellee's car is not out of line when the Court observes the damage to appellee's car as shown in Exhibit A and considers that appellee's car hit only a *glancing*, and *not ahead-on, blow*.

It is believed that this evidence of speed was not only remote but highly prejudicial when not traced to the scene of the accident, when no other acts of misconduct on the part of the government driver were shown, and *speed was not shown to be the cause of the accident*.

III.

**Error in Permitting McCoy to be Called as a Witness
Under Rule 43(b), F. R. C. P.**

At the outset, appellant wishes to point out that McCoy was at the trial at Fresno by agreement of counsel that appellant would have the San Francisco witnesses present and that appellee would secure the attendance of those from Los Angeles [Tr. p. 38]. McCoy was not called or used as a government witness as appellee would have the Court believe. He was far more adverse to the government than to Uarte because the widows of the government driver and passenger had named him and his employer defendants in their wrongful death action at Madera. They were still defendants in that action.

Appellee asserts (Brief pp. 30, 31) that appellant has violated Rules 19 and 20 (2-d) of the Rules of Practice of this Court.

Due to the shortness of time of preparing, printing and serving this Reply Brief, appellant has been unable to verify or deny the accusation as to Rule 19. Appellant has scrupulously observed the rules and requirements of this appeal and to the best of counsel's present belief, appellee was served with the Statement of Points. However, it is submitted that appellee has not been prejudiced in any case as the *entire* record of the trial court proceedings was certified and printed, including the Statement of Points complained of. If, in fact, appellee lost an opportunity to make a further Designation of Record, there was actually nothing left to designate.

Appellant admits that, due to inadvertence, Rule 20 (2-d) was not meticulously complied with but page 20 of Appellant's Opening Brief recites that the discussion,

Court's remarks, and ruling were to be found at pages 118 to 121 of the Transcript. The objection was not pointed out specifically because the language quoted in italics on page 32 of appellee's brief was not noted as being an obvious error in the transcript until after the record had been printed, and it was then too late to have the Reporter's Transcript corrected. This statement was in fact, an objection as the second portion of the quoted sentence shows. The Court considered it as such by *overruling the objection* [Tr. p. 121; Appellee's Brief p. 34].

These objections are believed to be purely arbitrary and not well taken. It is respectfully submitted that appellee has been in no way prejudiced and that these objections should not foreclose a decision of this case on the merits.

At the time of this trial there was no adversity between Uarte and McCoy and McCoy was no longer a party to this action. The Madera action had no bearing on this case. McCoy was admittedly not hostile [Tr. p. 36], and had willingly testified in the Madera action. He was therefore not an unwilling witness, as appellee well knew, and his testimony discloses uncertainty but not unwillingness. As stated above, his adversity was to the government and not to Uarte. The use of Rule 43(b), however, enabled appellee to force upon McCoy statements which his better judgment has since convinced him were ill-advised and untrue (see part I above). This ruling therefore proved highly prejudicial as far as the government was concerned.

The trial court held that McCoy could be examined as an unwilling witness and, contrary to appellee's statement (bottom p. 35 of his Brief), as an adverse party when the Court said, as appellee himself quoted on page 34 of his Brief, "I think, moreover, that he can be cross-

examined under Rule 43 by virtue of the fact that he was a party to this action.”

As stated above, appellant *did object* to this witness being called under Rule 43(b), and the trial court took cognizance of the objection, though appellee’s counsel seeks to take advantage of an obvious error or misstatement in the Reporter’s Transcript in the statement attributed to appellant’s counsel (Appellee’s Brief p. 36). A reading of that statement will convince the Court that the first portion of that sentence is meaningless unless considered with the balance of the sentence as constituting an objection. Counsel for both parties, at the trial, had argued the point in every sense as an objection. The Court treated it as such. Appellee’s contention merely seeks to obscure and confuse the issue.

At page 38 of appellee’s brief, appellee states that the use of McCoy’s statement, made the night of the accident, was suggested by the United States Attorney, referring to Transcript, pages 41 and 42. This Court is invited to read those pages of the transcript in light of his statement. The United States Attorney suggested the authentication of the Madera trial transcript [Tr. p. 41]. Mr. McKnight suggested authentication of the statements taken the night of the accident [Tr. p. 42].

Appellant’s repeated replies to the numerous misstatements of appellee’s counsel, pointed out in this brief, may seem trivial but it is believed that this Court should be aware of these matters where they tend to obscure the issues.

IV.

The Trial Court Erred in Overruling Objections to the Findings of Fact.

This point has been covered in Appellant's Opening Brief. Appellant merely contends that the evidence does not support the theory of the accident set forth in the Findings, and that the statements of the Court at the time of the argument, as revealed in the transcript, indicate that the Court could not state what happened. However, he did indicate that he didn't follow appellee's theory of the case as shown by the statements quoted on pages 22 and 23 of Appellant's Opening Brief.

Conclusion.

This is a case with only two living witnesses (The McCoy's). Mrs. McCoy didn't know anything about what took place, and he the Court disbelieved. Even with this witness' testimony no negligence was shown. Without it, there is nothing. The appellee has failed to carry the burden of proof and prove negligence by a preponderance of the evidence, or at all. After all the discussion in these briefs, the same question still remains unanswered, "*What act of negligence* by the government driver proximately caused this accident?"

Respectfully submitted,

JAMES M. CARTER,

United States Attorney,

ERNEST A. TOLIN,

Chief Assistant U. S. Attorney,

CLYDE C. DOWNING,

Assistant U. S. Attorney

Chief, Civil Division,

MAX F. DEUTZ,

Assistant U. S. Attorney,

Attorneys for Appellant.

United States
Court of Appeals
for the Ninth Circuit

EDWIN B. CHILLINGWORTH,

Appellant,

vs.

TERRITORY OF HAWAII,

Appellee.

Transcript of Record

Appeal from the Supreme Court for the
Territory of Hawaii

FILED

NOV 23 1948

PAUL P. O'BRIEN,

CLERK

No. 12043

United States
Court of Appeals
for the Ninth Circuit

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vs.

TERRITORY OF HAWAII,

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Transcript of Record

Appeal from the Supreme Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

RALPH F. MATSUMURA, ESQ.,

301 Merchandise Mart Building,
Honolulu, T. H.,

Attorney for plaintiff in error.

TOM OKINO, ESQ.,

County Attorney, Hawaii County,
and Deputy Attorney General,
Hilo, Hawaii, T. H.,

Attorney for defendant in error.

In the Circuit Court of the Third Circuit,
Territory of Hawaii

January Term 1946

No. 2323

'TERRITORY OF HAWAII

vs.

EDWIN B. CHILLINGWORTH,

Defendant.

Indictment for Violation of Section 11240, R.L.H.
1945, Embezzlement.

INDICTMENT

The Grand Jury of the Third Circuit of the
Territory of Hawaii do present that

COUNT I.

Edwin B. Chillingworth at Hilo, District of South Hilo, in the County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 20th day of April, 1945, having theretofore been employed by Katherine Leanes to collect and receive moneys due the said Katherine Leanes, and having then and there received in his, the said Edwin B. Chillingworth's possession, control, custody and keeping a thing of value, to wit, five hundred and fifty and no/100 dollars (\$550.00), lawful money of the United States of America, a more particular description of which money is unknown to the Grand Jurors, by the consent and authority of the said Katherine Leanes, did, without the consent and against the

will of the owner thereof entitled thereto, the said moneys then and there feloniously embezzle and fraudulently convert and dispose of to his own use and benefit and did then and thereby commit the crime of Embezzlement, contrary to Section 11240, Revised Laws of Hawaii 1945, and contrary to the form of the statute in such case made and provided [8*]

And in order to charge the said Edwin B. Chillingworth with the crime of Embezzlement in the first degree, arising from the same criminal acts and transactions as hereinabove set forth in the first count, in the alternative, in different form and count to meet the proof, it is further charged that

COUNT II.

Edwin B. Chillingworth at Hilo, District of South Hilo, in the County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 20th day of April 1945, being then and there by Katherine Leanes entrusted with and with the consent of said Katherine Leanes, having then and there in his possession, control, custody and keeping a thing of value, to wit, four hundred fifty and no/100 dollars (\$450.00), lawful money of the United States of America, belonging to the said Katherine Leanes, a more particular description of which money is unknown to the Grand Jurors, which said money he, the said Edwin B. Chillingworth, had theretofore collected with the consent and authority of said Katherine

* Page numbering appearing at foot of page of original certified Transcript of Record.

Leanes, did feloniously embezzle and fraudulently convert and dispose of said money to his own use and benefit, without the consent and against the will of said Katherine Leanes, who was then and there the owner of said money, and did then and there and thereby commit the crime of Embezzlement contrary to Section 11240, Revised Laws of Hawaii 1945, and contrary to the form of the statute in such case made and provided.

And in order to charge the said Edwin B. Chillingworth with the crime of Embezzlement in the first degree, arising from the same criminal acts and transactions as hereinabove set forth in the first Count, in the alternative, in different form and count to meet the proof, it is further charged that

COUNT III.

Edwin B. Chillingworth at Hilo, District of South Hilo, in the County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 20th day of April 1945, being then and there by L. Brabo entrusted with and with the consent of said L. Brabo, having then and there in his possession, control, custody and keeping a thing of value, to wit, one hundred dollars (\$100.00), lawful money of the United States of America, belonging to the said L. Brabo, a more particular description [9] of which money is unknown to the Grand Jurors, which said money he, the said Edwin B. Chillingworth, had theretofore collected with the consent and authority of said

L. Brabo, did feloniously embezzle and fraudulently convert and dispose of said money to his own use and benefit, without the consent and against the will of said L. Brabo, who was then and there the owner of said money, and did then and there and thereby commit the crime of Embezzlement contrary to Section 11240, Revised Laws of Hawaii 1945, and contrary to the form of the statute in such case made and provided.

And in order to set forth the unlawful and felonious acts of the said Edwin B. Chillingworth, the Grand Jurors aforesaid do further say and present that

COUNT IV.

Edwin B. Chillingworth at Hilo, District of South Hilo, in the County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 20th day of April 1945, having theretofore been employed by Leonardo Leanes and others to collect and receive moneys due the said Leonardo Leanes and others, and having then and there received in his, the said Edwin B. Chillingworth's, possession, control, custody and keeping anything of value, to wit, three hundred seven and 37/100 dollars (\$307.37), lawful money of the United States of America, a more particular description of which money is to the Grand Jurors unknown, by the consent and authority of the said Leonardo Leanes and others, did, without the consent and against the will of the owners thereof entitled thereto, the said moneys then and there

feloniously embezzle and fraudulently convert and dispose of to his own use and benefit and did then and there and thereby commit the crime of Embezzlement, contrary to Section 11240, Revised Laws of Hawaii 1945, and contrary to the form of the statute in such case made and provided.

And in order to set forth the unlawful and felonious acts of the [10] said Edwin B. Chillingworth, the Grand Jurors aforesaid do further say and present that

COUNT V.

Edwin B. Chillingworth at Hilo, District of South Hilo, in the County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 5th day of December 1945, having theretofore been employed by Leonardo Leanes and others to collect and receive moneys due the said Leonardo Leanes and others, and having then and there received in his, the said Edwin B. Chillingworth's, possession, control, custody and keeping a thing of value, to wit, two hundred fifty-two dollars (\$252.00), lawful money of the United States of America, a more particular description of which money is unknown to the Grand Jurors, by the consent and authority of the said Leonardo Leanes and others, did, without the consent and against the will of the owners thereof entitled thereto, the said moneys then and there feloniously embezzle and fraudulently convert and dispose of to his own use and benefit and did then and there and thereby commit the crime of Embezzlement,

contrary to Section 11240, Revised Laws of Hawaii 1945, and contrary to the form of the statute in such case made and provided.

A true bill found this 19th day of February, 1946.

/s/ W. B. MACFARLANE,
Foreman of the Grand Jury.

/s/ TOM OKINO,
County Attorney, County of Hawaii, and Deputy
Attorney General.

[Endorsed]: Filed Feb. 20, 1946. [11]

[Title of Circuit Court and Cause, Cr. No. 2413]

INDICTMENT

The Grand Jury of the Judicial Circuit of the Territory of Hawaii do present that Edwin B. Chillingworth at Hilo, District of South Hilo, in the County of Hawaii, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 5th day of December 1945, having theretofore been employed as agent by Leonardo Leanes to collect and receive moneys due the said Leonardo Leanes and others, and having then and there received in his, the said Edwin B. Chillingworth's, possession, control, custody and keeping a thing of value, to wit, two hundred fifty-two dollars (\$252.00), lawful money of the United States of America, belonging to the said Leonardo Leanes and others, a more particular description of which

money is unknown to the Grand Jurors, by the consent and authority of the said Leonardo Leanes and others, did, without the consent and against the will of the said Leonardo Leanes and others, who were then and there the owners of said money, then and there feloniously embezzle and fraudulently convert and dispose of said money to his own use and benefit and did then and there and thereby commit the crime of Embezzlement, contrary to Section 11240, Revised Laws of Hawaii 1945, and [13] contrary to the form of the statute in such case made and provided.

A true bill found this 16th day of October, 1946.

/s/ W. B. MACFARLANE,

Foreman of the Grand Jury.

/s/ TOM OKINO,

County Attorney, County of Hawaii, and Deputy Attorney General.

[Endorsed]: Filed Oct. 17, 1946. [14]

In the Circuit Court of the Third Circuit,
Territory of Hawaii

No. 2413

TERRITORY OF HAWAII

vs.

EDWIN B. CHILLINGWORTH,

Defendant.

Criminal Indictment in 1 Count for Violation of
Section 11240, R.L.H. 1945.

JUDGMENT OF THE COURT

On the 12th day of November, 1946, came the County Attorney of the County of Hawaii acting as Deputy Attorney General of the Territory of Hawaii, and the defendant, Edwin B. Chillingworth, appearing in proper person, and by his counsel, O. P. Soares, Esq., and having been asked what was his plea, he replied "Not Guilty," and

That thereafter, to wit, on the 12th day of November, 1946, said defendant appeared in this Court with his attorney and withdrew his plea of "Not Guilty" theretofore pleaded by said defendant to the indictment in the above-entitled cause; that thereafter, to wit, on said 12th day of November, 1946, after having been advised by his counsel, said defendant pleaded "Guilty," and

The defendant having entered his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit, in that he did at Hilo, District of South Hilo, in the County of Hawaii,

Territory of Hawaii, and within the jurisdiction of this Honorable Court, on or about the 5th day of December, 1945, having theretofore been employed as agent by Leonardo Leanes to collect and receive moneys due the said Leonardo Leanes and others, and having then and there received [16] in his, the said Edwin B. Chillingworth's possession, control, custody and keeping a thing of value, to wit, two hundred fifty-two dollars (\$252.00), lawful money of the United States of America, belonging to the said Leonardo Leanes and others, a more particular description of which money was unknown to the Grand Jurors, by the consent and authority of the said Leonardo Leanes and others, without the consent and against the will of the said Leonardo Leanes and others, who were then and there the owners of said money, then and there feloniously embezzle and fraudulently convert and dispose of said money to his own use and benefit and did then and there and thereby commit the crime of Embezzlement, and the defendant having been asked whether he had anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It is by the Court ordered and adjudged that the defendant, Edwin B. Chillingworth, is found guilty of said offense and he is hereby sentenced to imprisonment at hard labor at and in the Oahu Penitentiary, Territory of Hawaii, for a period of not more than ten (10) years and to pay a fine of One Hundred Dollars (\$100.00); the execution of that

portion of the sentence imposing imprisonment is hereby suspended and the said defendant is hereby placed upon probation for a period of five (5) years, under the terms of probation set forth in that Minute Order of this Court, "In Re Adult Probation," dated April 16, 1940, said term of probation to run concurrently with that imposed by this Court upon said defendant in Criminal Case No. 2323, offense of Embezzlement; and that as special terms of probation, (1) the defendant is hereby ordered to pay to the Clerk of the Third Circuit Court the fine of \$100.00 at [17] the rate of \$10.00 per month payable after the fine in Criminal Case No. 2323 is paid in full; (2) that said defendant shall, within the next thirty (30) days and without further action on the part of the Attorney General of the Territory of Hawaii, submit to the Supreme Court of the Territory of Hawaii for cancellation his license to act as a district court practitioner in the Territory; (3) that said defendant shall not engage in the work of being a private detective, either for pay or without, during the period of probation; (4) and that in the matter of restitution the defendant shall take care of the same in accordance with the order provided in the companion case, Criminal No. 2323.

Witness the Honorable Martin Pence, Judge of the Circuit Court of the Third Circuit, Territory of Hawaii, at Hilo, Hawaii, this 16th day of January, A. D. 1947.

(Seal) /s/ MARTIN PENCE.

[Endorsed]: Filed Feb. 15, 1947. [18]

[Title of Circuit Court and Cause, C. Nos. 2323,
2413.]

Violation Section 11240. R.L.H. 1945

MOTION FOR REVOCATION OF PROBATION
AND SUSPENSION OF SENTENCE

Comes now the Territory of Hawaii, by Albert M. Felix, Deputy County Attorney of the County of Hawaii, and Deputy Attorney General of the Territory of Hawaii, and moves this Honorable Court that the probation granted to Edwin B. Chillingworth, the above-named probationer, on the 16th day of January, 1947, be revoked and set aside and that sentence as heretofore imposed be executed.

This Motion is based upon the records and files of this case and upon the affidavit attached hereto and made a part hereof, to which reference is hereby made.

Dated at Hilo, Hawaii, this 10th day of June, 1947.

TERRITORY OF HAWAII.

By /s/ ALBERT M. FELIX,
Deputy County Attorney, County of Hawaii, and
Deputy Attorney General, Territory of Hawaii.

AFFIDAVIT

Territory of Hawaii,
County of Hawaii—ss.

Albert M. Felix, being first duly sworn, on his oath deposes and says:

That he is a Deputy County Attorney of the County of Hawaii, Territory of Hawaii;

That on the 12th day of November, 1946, as to Criminal No. 2323, Edwin B. Chillingworth pleaded guilty to Counts II and III of said indictment, to wit, violation of Section 11240, R.L.H. 1945, Embezzlement; that on the 16th day of January, 1947, said defendant was sentenced to imprisonment at hard labor at and in the Oahu Penitentiary, Territory of Hawaii, for a period of not more than ten (10) years and to pay a fine of Fifty Dollars (\$50.00); however, the execution of that portion of said sentence ordering imprisonment was suspended and the defendant was placed upon probation for a period of five (5) years under the terms of probation set forth in that Minute Order of this Court, "In Re Adult Probation," dated April 16, 1940, and upon the special terms of probation enumerated in the judgment of the Court dated January 16, 1947, in said Criminal Number 2323, on file in this Court;

And as to Criminal Number 2413, Edwin B. Chillingworth pleaded guilty in said Court to the violation Section 11240, R.L.H. 1945, Embezzlement; that on the 16th day of January, 1947, said defendant was sentenced to imprisonment at hard labor at and in the Oahu Penitentiary, Territory of Hawaii, for a period of not more than ten (10) years and to pay a fine of One Hundred Dollars (\$100.00); however, the execution [21] of that portion of said sentence ordering imprisonment was suspended and the defendant was placed on probation for a period of five (5) years under the terms of probation set forth in that Minute Order of this

Court, "In Re Adult Probation," dated April 16, 1940, said term of probation to run concurrently with that imposed by this Court upon said defendant in Criminal Number 2323, and upon the special terms of probation enumerated in the Judgment of the Court dated January 16, 1947, in said Criminal No. 2413 on file in this Court;

That subsequent to being placed upon probation, to wit, on the 20th day of April, 1947, said probationer was charged with the violation of the provisions of Section 11382, R.L.H. 1945, in that he did then and there slaughter eleven heads of cattle for the purpose of human consumption and fail to retain the hides for a period of two weeks after the killing of said cattle; that the said probationer was thereupon found guilty of said offense on the 12th day of May, 1947, by the District Magistrate of the District Court of South Hilo and ordered to pay a fine of \$100.00, cost remitted, the judgment being satisfied.

Further affiant sayeth not.

Dated at Hilo, Hawaii, this 10th day of June, 1947.

/s/ ALBERT M. FELIX.

Subscribed and sworn to before me this 10th day of June, 1947.

(Seal) /s/ TOM OKINO,

Notary Public, Third Circuit, Territory of Hawaii.

My commission expires May 10, 1951.

[Endorsed]: Filed June 10, 1947. [22]

In the District Court of South Hilo, County and
Territory of Hawaii

Crim. No. 29712-1510

TERRITORY OF HAWAII

vs.

EDWIN CHILLINGWORTH,

Defendant.

RETENTION OF CATTLE HIDE
JUDGMENT AND SENTENCE

I am satisfied that from the evidence in the case, that this meat enterprise in Puna was entered into as a joint enterprise between the defendant Chillingworth, Kauwe and Ahana. I think there has been a good deal of what you might call coalition of stories as were told here in Court this morning as a result of collaboration of defendants and Mr. Ahana. I have no doubt but what there was that joint enterprise provision between the three men when they went and got this permission from Mr. Lyman to slaughter cattle on his land. I have no doubt that when these cattle were slaughtered, they were slaughtered under the direction of Mr. Chillingworth, one of the owners and one of the members of the joint enterprise. I have no doubt in my mind but that the employee Makuakane was under the direction of Mr. Chillingworth at the time.

The evidence leaves it clear that when these animals were sold, some of them, the hides were not retained for the period mandated by the Statute.

The suggestion is made that because of the fact that the Statute refers to a bullock, therefore, they could go out and do as they pleased with [24] cows and heifers or bulls at that time.

I think that I am convinced that the defendant, Chillingworth, actively participated in the catching and slaughtering of these cattle; participated as a member of the joint enterprise and as an owner when the cattle were caught and slaughtered. I don't believe that Mr. Kauwe is in the same category. I don't think that he participated in that. I don't think he was actively engaged in it and I think he can not come within the description of the party involved under Section 11380.

I therefore find the defendant, Isaac Kauwe, not guilty and he is discharged in No. 1509. I find the defendant, Edwin Chillingworth, in 1510, guilty as charged and he is sentenced to pay a fine of \$100.00, cost remitted; stand committed until the fine is paid.

CERTIFICATE

This is to certify that the foregoing and attached two pages of typewritten matter constitute a full, true and correct Transcript of the Judgment and Sentence of the Court in the above entitled cause on the 12th day of May, 1947.

/s/ ELAINE A. L. YAP,
2nd Asst. Clerk & Reporter, District Court of
South Hilo. [25]

In the Circuit Court of the Third Circuit,
Territory of Hawaii

C. Nos. 2323 & 2413

TERRITORY OF HAWAII

vs.

EDWIN B. CHILLINGWORTH,

A Probationer.

Violation of Section 11240, R.L.H. 1945

NOTICE OF MOTION

To Edwin B. Chillingworth:

You are hereby notified that the foregoing Motion will be presented for allowance in the above-entitled Court and cause on Monday, June 16, 1947, at 10:00 a.m., or as soon thereafter as the matter can be heard.

/s/ ALBERT M. FELIX,

Deputy County Attorney, County of Hawaii, and
Deputy Attorney General, Territory of Hawaii.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion on Edwin B. Chillingworth by personally delivering the same to him in Hilo, County and Territory of Hawaii, at the hour of 9:25 a.m. on June 12, 1947.

/s/ DELPHINE NOBRIGA,
Police Officer.

Circuit Court, Third Circuit, returned at 9:35 o'clock a.m. June 12, 1947. /s/ W. R. Whittington, Assistant Clerk.

[Endorsed]: Filed June 10, 1947. [27]

[Title of Circuit Court and Cause.]

MOTION TO SET BOND

Comes now Albert M. Felix, Deputy County Attorney of the County of Hawaii and Deputy Attorney General of the Territory of Hawaii, and hereby moves this Honorable Court that the bond in the above-entitled cause be set at One Thousand Dollars (\$1000.00).

Dated at Hilo, Hawaii, this 8th day of August, 1947.

TERRITORY OF HAWAII,

By /s/ A. M. FELIX,
Deputy County Attorney, County of Hawaii, and
Deputy Attorney General, Territory of Hawaii.

NOTICE OF MOTION

To Calvin McGregor, Esq., Attorney for the Defendant:

You are hereby notified that the foregoing Motion will be heard on Wednesday, August 13, 1947, at 11:00 o'clock a.m., or as soon thereafter as counsel can be heard.

/s/ A. M. FELIX. [29]

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion on Calvin McGregor, Esq., attorney for the defendant, by mailing the same, duly stamped at the United States Post Office at Hilo, Hawaii, on the 8th day of August, 1947, addressed to his office at 210 Hawaiian Trust Building, Honolulu, Hawaii.

/s/ A. M. FELIX.

[Endorsed]: Filed Aug. 3, 1947. [30]

[Title of Circuit Court and Cause.]

NOTICE OF APPEAL

Comes now Edwin B. Chillingworth, Defendant herein, by his attorneys King & McGregor, and hereby gives notice of his intention to appeal by writ of error to the Supreme Court from the decision and judgment of the Circuit Judge in the above entitled matter, in revoking the probation heretofore granted to defendant in Criminal Cases

2323 and 2413 in the above-entitled court, terminating the suspension of sentence relative to imprisonment in said cases, committing the said defendant to prison.

Dated: Honolulu, Hawaii, August 4th, 1947.

EDWIN B. CHILLINGWORTH,
Defendant,

By KING & MCGREGOR,

By /s/ CALVIN C. MCGREGOR,
His Attorneys.

[Endorsed]: Filed Aug. 4, 1947. [32]

[Title of Circuit Court and Cause.]

DIRECTION TO PREPARE TRANSCRIPT
OF EVIDENCE

To Annabelle Kekuna, Official Reporter, Third Circuit Court:

Upon application of the Plaintiff-in-Error above named therefor, you are hereby directed to prepare in the regular order of cases tried, a transcript of the evidence taken upon the trial of the above entitled cause upon satisfactory security being furnished.

Dated: Hilo, Hawaii, T. H., this 14th day of August, 1947.

(Seal) /s/ MARTIN PENCE,
Judge of the Above Entitled
Court.

[Endorsed]: Filed Aug. 14, 1947. [34]

In the Circuit Court of the Third Circuit,
Territory of Hawaii

C. Nos. 2323 & 2413

TERRITORY OF HAWAII

vs.

EDWIN B. CHILLINGWORTH,

Defendant.

Violation of Section 11240, R.L.H. 1945

DECISION AND JUDGMENT

This matter came on for hearing on the 24th day of July, 1947, after defendant had been given from June 16, 1947 to July 24, 1947 in order to secure counsel and prepare himself for a hearing on the Motion to Revoke Probation heretofore granted him. He was ably represented in Court by Calvin McGregor, Esq.

The facts proved by Deputy Attorney General Felix showed, beyond any doubt, that the defendant, Edwin B. Chillingworth, has violated this Court's Rule 8, relative to probation, viz., that he should at all times obey the laws of the Territory of Hawaii. The facts proved, showed to my satisfaction, beyond a reasonable doubt, that the defendant in his capacity as a member of "a joint enterprise" had engaged in cattle slaughtering business in Puna and that he had not retained the hides of the cattle slaughtered by him and his associates. The evidence also clearly showed that he had been charged with the violation of Section

11382, R.L.H. 1945, for this and that he had pled not guilty to said charge. His defense in the South Hilo District Court, from the record, was [36] that he was simply an employee of one Leslie Chang, also known as Leslie Ahana, and that the responsibility was not his but Ahana's. He was nevertheless found guilty as charged. Before me is the decision of Judge Irwin on that point, and I quote: "I have no doubt but what there was that joint enterprise provision between the three men when they went and got this permission from Mr. Lyman to slaughter cattle on his land. I have no doubt that when these cattle were slaughtered, they were slaughtered under the direction of Mr. Chillingworth, one of the owners and one of the members of the joint enterprise."

When the defendant took the stand on his own behalf in order to explain away his conviction, *supra*, and give reasons why his probation should not be revoked for such admitted violation of the Territorial law, the defendant again insisted that he was but an employee of Chang at the time. This insistence—in the face of the decision of Judge Irwin—detracted from the strength of Chillingworth's testimony. By the same token, the character of the witness Chang, also known as Ahana, and the evasiveness of his answers likewise detracted from the evidence which was attempted to be given by Chang in Chillingworth's favor.

The Court noted that no appeal was perfected by Chillingworth from the decision of Judge Irwin and there arises from that fact and inference that

the defendant was satisfied with the justice of that decision.

If Chillingworth were a stupid, ignorant defendant, then such stupidity and ignorance would be considered by the Court in determining the willfulness of the admitted violation of one of the terms of probation.

As above indicated, the violation in the instant case, [37] at first glance, would appear to be a violation resulting from omission rather than commission. When it is noted that the defendant has, by his own statement, been practicing as a district court practitioner for some 19 or 20 years and when one reviews the prior record of the defendant, the claimed negligent omission which resulted in his conviction in the District court taken on a different picture and, by fair inference, from the record, becomes one of commission, viz., another act of willful disregard of the mandates of the law.

At the time that I originally sentenced the defendant and placed him on probation on January 16, 1947, I said, "I wish to advise you now that the probation administrator or her assistants will give you a full and clear and detailed understanding of what your obligations are, and I advise you now that the sword of Damocles hanging over your head held there by a thread and that thread which holds the sword—that is to say the imprisonment in the penitentiary on Oahu—is the absolute and honest fulfillment of the terms of probation, and the living by you in this community or wherever you may be permitted to go, if you are permitted to depart herefrom—to continue and repeat, the living by

you in this Community of an honest and honorable and respected life.

“Your record is one of slipperiness or evasions and, like the slug that crawls across the garden path, it has left a slimy trail behind. I don’t want any more such slimy trail during the next five years.”

There were two complaints made to the probation administrator concerning the defendant’s actions prior to his being brought before me on the instant charge. From her testimony, the probation administrator, after investigation, [38] decided that the complaints could not be substantiated sufficiently to charge the defendant with violation of probation. That such complaints were made, however, was part of “the slimy trail” which the defendant seems to leave behind wherever he goes. The instant charge is simply more of that slimy trail. For my part, I believe that the trail should end. I believe the defendant has been given sufficient opportunity to prove himself in this community. I feel he has failed in his obligation to the community. I feel that his conviction of the charge above referred to is sufficient to have broken the “thread.”

For the violation of Rule 8 of the terms of probation heretofore granted to the defendant, the probation heretofore granted is revoked.

It is therefore ordered, adjudged and decreed: That in Criminal case No. 2323, the probation heretofore granted being now revoked, the suspension of the execution of that portion of the sentence

relative to imprisonment heretofore decreed by that Judgment dated January 16, 1947, is hereby terminated and the defendant is ordered committed to prison in accordance with said Judgment; and in Criminal case No. 2413, the probation heretofore granted being now revoked, the suspension of the execution of that portion of the sentence relative to imprisonment heretofore decreed by that Judgment dated January 16, 1947, is hereby terminated and the defendant is ordered committed to prison in accordance with said Judgment.

It is further ordered that such portions of the sentences relative to imprisonment shall run concurrently, but that such portions of the sentences relative to fines shall be cumulative. [39]

Let Mittimus issue on Wednesday, July 30, 1947, at 10:00 a.m. upon the sentences imposed.

Dated at Hilo, Hawaii, this 30th day of July, A.D. 1947.

(Seal) /s/ MARTIN PENCE,
 Judge. [40]

[Endorsed]: Filed July 30, 1947.

MINUTES

Monday, June 16, 1947

Court convened at 10:07 a.m. with Judge Martin Pence, presiding. C. 2323 and C. 2413, Territory of Hawaii, Plaintiff vs. Edwin B. Chillingworth, Defendant. Motion for Revocation of Probation. Present: A. M. Felix, Deputy County Attorney, for the Plaintiff; the defendant in person. Mr. Chillingworth asked for a continuance of the matter.

The Court made a statement. Mr. Felix made a statement. The Court continued the cases to July 7, 1947 at 11:00 a.m.

Note on Calendar, Monday, July 7, 1947.

Passed to July 21, 1947 by request of the County Attorney.

Note on Calendar, Monday, July 21, 1947.

Passed to July 24, 1947 by request of Samuel King, Jr., Counsel for the dedendant.

Thursday, July 24, 1947.

Court convened at 8:28 a.m. with Judge Martin Pence, presiding. C. 2323 and C. 2413, Territory of Hawaii, Plaintiff vs. Edwin B. Chillingworth, Defendant. Motion for Revocation of Probation and Suspension of Sentence. Present: A. M. Felix, representing the Territory; Calvin McGregor, of King and McGregor, Counsel for Defendant. Mr. Felix made a statement, moving that defendant's probation be revoked because he had been found guilty of a misdemeanor in District Court; namely, failing to retain cattle hides for fourteen days. Etha B. Coulter sworn, then examined by Mr. McGregor on direct. Mr. Felix cross-examined witness. Redirect by Mr. McGregor. Recross by Mr. Felix. [41] Thursday, July 24, 1947, minutes continued.

Leslie Chang sworn, then examined by Mr. McGregor. Cross-examination by Mr. Felix. Redirect by Mr. McGregor. Court examined witness. Further redirect by Mr. McGregor.

Edwin B. Chillingworth sworn, then examined by Mr. McGregor. Probationer's Card was marked Defendant's Exhibit "1-i" for identification at 10:49 a.m. Marked Defendant's Exhibit "1" in evidence at 10:51 a.m. Mr. Felix cross-examined the witness. Defendant's Exhibit "1" withdrawn and returned to defendant.

Argument by Mr. McGregor. Argument by the Territory, was waived. Court took the matter under advisement; decision to be rendered within a week, at which time both attorneys would be notified.

[Endorsed]: Filed July 30, 1947.

[42]

[Title of Circuit Court and Cause.]

CLERK'S CERTIFICATE

I, A. S. Carvalho, Chief Clerk of the Circuit Court of the Third Circuit, Territory of Hawaii, do hereby certify that the foregoing copies of documents in the above entitled cause are true, full and correct copies of the originals now on file in my office, with the exception of the Judgment and Sentence of the District Court of South Hilo, County of Hawaii, Territory of Hawaii, which is a copy of the same filed with and referred to in the Affidavit, a part of the Motion for Revocation of Probation and Suspension of Sentence, the same being specifically designated and enumerated as follows:

1. Indictment, Judgment of the Court, Motion

for Revocation of Probation and Suspension (Affidavit, Judgment and Sentence of the District Court of South Hilo and Notice of Motion), Notice of Appeal, Motion to Set Bond and Direction to prepare transcript of evidence:

2. Decision and Judgment on revocation of probation and suspension of sentence;

Pursuant to the Praecipe, the foregoing, together with the original Transcript of Evidence, the Clerk's Minutes, the Writ of Error and Return are transmitted herewith to the Clerk of the Supreme Court.

The Praecipe made reference to "All Exhibits". The only exhibit in the above entitled matter, Defendant's Exhibit "1", was withdrawn and returned to the defendant. (Refer to page 2 [43] of the Clerk's Minutes.)

Dated at Hilo, Hawaii, this 12th day of November, 1947.

(Seal) /s/ A. S. CARVALHO,
Chief Clerk.

[44]

[Title of Circuit Court and Cause.]

AFFIDAVIT OF PREJUDICE

Territory of Hawaii,
City and County of Honolulu—ss.

Edwin B. Chillingworth, being first duly sworn, on oath deposes and says:

That he is the Defendant in the above entitled

cause; that the Honorable Martin Pence, Judge of the above entitled court, has a personal bias and prejudice against him, the said Defendant; that the facts and reasons for the belief that said judge has a bias and prejudice against him are:

(a) That the Honorable Judge Martin Pence has heretofore revoked his, the said Defendant's probation;

(b) That the Honorable Judge Martin Pence made unsubstantiated remarks with respect to the Defendant's character in open court and in a decision rendered in a prior case before his court;

That the Defendant requests that he be tried by or transferred to another Judge and there tried or otherwise disposed of.

/s/ EDWIN B. CHILLINGWORTH,

Subscribed and sworn to before me this 28th day of January, 1948.

(Seal) /s/ JEAN T. YAMODA,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires August 29, 1951. [46]

I hereby certify that I am counsel of record for the above named defendant and that the above and foregoing Affidavit is made in good faith.

/s/ RALPH F. MATSUMURA,
Attorney.

[Endorsed]: Filed June 7, 1948.

[47]

In the Supreme Court of the Territory of Hawaii

No. 2687

TERRITORY OF HAWAII,

Defendant-in-error,

vs.

EDWIN B. CHILLINGWORTH,

Plaintiff-in-error.

Error from Circuit Court, Third Circuit, Honorable Martin Pence, presiding. (Violation of Section 11240, R.L.H. 1945, C. Nos. 2323 and 2413)

APPLICATION FOR WRIT OF ERROR

To the Clerk of the Supreme Court:

Please issue a Writ of Error in the above entitled case to the Clerk of the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, on behalf of said Edwin B. Chillingworth, returnable to the Supreme Court.

Dated Honolulu, T. H., October 24, 1947.

/s/ EDWIN B. CHILLINGWORTH,
Plaintiff-in-error.

[Endorsed]: Filed Oct. 27, 1947.

[49]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Edwin B. Chillingworth, Plaintiff-in-error in the above-entitled matter, by his attorneys, King & McGregor, and assigns as grounds of reversal the following errors of the trial court:

I.

That the Court erred in revoking the probation and suspension of sentence of Plaintiff-in-error in the above entitled cases, for the reason that the evidence adduced at the hearing on the motion for such revocation affirmatively revealed that Plaintiff-in-error had not violated any of the terms of his probation.

II.

That the Court erred in revoking the said probation and suspension of sentence, for the reason that the said revocation was based upon a violation of the provisions of Section 11382, Revised Laws of Hawaii 1945, as set forth in the affidavit attached to the motion for revocation, and in the decision and judgment whereas said Section 11382 is not a penal statute of the Territory of Hawaii, or a statute capable of being violated. [51]

III.

That the said revocation was an arbitrary exercise of judicial discretion.

IV.

That the said revocation was an abuse of judicial discretion.

V.

That the Court erred in revoking said probation in that the grounds set forth for said revocation were not of the character warranting such revocation.

VI.

That the Court erred in revoking said probation in that there is no valid law of the Territory of Hawaii requiring any person to retain the hides of slaughtered cattle for any period of time.

VII.

That the Court erred in said revocation for the reason that, in the trial for the violation of said Section 11382, for the conviction of which said revocation was ordered, the Plaintiff-in-error was deprived of rights guaranteed to him by the Constitution and laws of the United States of America.

Dated Honolulu, T. H., this 27th day of October, 1947.

EDWIN B. CHILLINGWORTH,

By KING & MCGREGOR,

By /s/ SAMUEL P. KING,

Attorneys for Plaintiff-in-error.

[Endorsed]: Filed Oct. 27, 1947.

[52]

[Title of Supreme Court and Cause.]

WRIT OF ERROR

Territory of Hawaii:

To the Clerk of the Circuit Court of the Third
Judicial Circuit, Territory of Hawaii:

Application having been made on behalf of Edwin B. Chillingworth for a Writ of Error in the above entitled case, you are hereby commanded forthwith to send to the Supreme Court the record in the said case.

Witness the Honorable Samuel B. Kemp, Chief Justice of the Supreme Court, this 27th day of October, A. D., 1947.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court.

To the Clerk of the Supreme Court:

The execution of the within Writ of Error appears by the record hereto annexed.

Dated Hawaii, T. H., this 13th day of November, 1947.

(Seal) /s/ A. S. CARVALHO,
Clerk of the Circuit Court of the Third Judicial
Circuit, Territory of Hawaii.

[Endorsed]: Filed Oct. 27, 1947.

[54]

In the Supreme Court of the Territory of Hawaii,

October Term, 1947

No. 2687

TERRITORY OF HAWAII,

vs.

EDWIN B. CHILLINGWORTH.

MOTION TO DISMISS APPEAL

Argued June 16, 1948. Decided June 28, 1948.

Kemp, C. J., Peters and Le Baron, JJ.

DECISION

Per Curiam. This is a criminal case in which the execution of the sentence imposed was suspended in part and the defendant placed on probation pursuant to the provisions of Revised Laws of Hawaii 1945, section 10843. While the defendant was on probation, the court having jurisdiction of the case under the power and authority reposed in it by Revised Laws of Hawaii 1945, section 10846, terminated the period of probation and proceeded to cause the sentence theretofore imposed to be executed. The defendant prosecuted error. The errors assigned are directed exclusively to a review of the order terminating probation.

The Territory moved to dismiss the writ of error upon the ground that it is only issuable out of the Supreme Court upon the application of a party

deeming himself aggrieved by a judgment of the Circuit Court in a criminal case to review the final judgment of sentence and that the order terminating the period of probation was an order made after the entry of the judgment of sentence and was not reviewable by writ of error. In our opinion, the motion is well-taken. [56]

In criminal cases a writ of error lies only to final judgment.¹ The provisions of the statute in respect to writs of error in criminal cases, quoted below² limits review upon writ of error to final judgment of sentence. Under its plain terms, orders after sentence are not reviewable. The provisions of law applicable to suspension of sentence and probation³ make no provision for appeals from orders terminating probation. Whether the same are reviewable by any other method of appeal is not before

¹ Perry, Common-law P1. p. 222; 1 Bishop's New Crim. Proc. § 1366, n. 7 and cases cited; § 1367, n. 1 and cases cited; see also *In re Apuna*, 6. Haw. 732; *In re Titcomb*, 9 Haw. 131; *In re Hoopsi*, 10 Haw. 610; *Ex parte Fugihara Oriemon*, 13 Haw. 102; *In re Gamaya*, 25 Haw. 414.

to writs of error in criminal cases, quoted below.²

² "Sec. 9551. Had when. A writ of error, returnable to the supreme court, may be issued by the clerk, or any deputy clerk or assistant clerk of the supreme court, upon the application of any party deeming himself aggrieved by the order or decree of a circuit judge at chambers, at any time before execution thereon is fully satisfied, within ninety days from the entry of which judgment, order or decree and the sentence of the court in a criminal case shall be the judgment."

³ R.L.H. 1945, §§ 10843-10846.

us for decision. They are not subject to review by writ of error.⁴ Under the circumstances, this court is without jurisdiction of the subject matter and the writ must be dismissed. It is so ordered.

T. Okino, County Attorney, County of Hawaii, and Acting Deputy Attorney General, for the motion.

R. F. Matsumura, contra.

By the Court:

/s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ SAMUEL B. KEMP,
Chief Justice.

/s/ E. C. PETERS,
Associate Justice.

/s/ LOUIS LE BARON,
Associate Justice.

[Endorsed]: Filed June 28, 1948.

[57]

⁴ Renado v. Lummus, 205 Mass. 155, 91 N. E. 144.

[Title of Supreme Court and Cause.]

JUDGMENT ON WRIT OF ERROR

In the above-entitled cause pursuant to the decision of the above-entitled court, rendered and filed on June 28, 1948, the writ of error is dismissed.

Dated Honolulu, T. H., June 29, 1948.

By the Court:

/s/ LEOTI V. KRONE,
Clerk.

Approved June 29, 1948.

E. C. PETERS,
Associate Justice.

I do hereby certify that the foregoing is a full, true and correct copy of the original, of the office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., June 29, 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed June 29, 1948.

[58]

[Title of Supreme Court and Cause.]

NOTICE OF JUDGMENT ON WRIT
OF ERROR

To Honorable Martin Pence, Judge of the Circuit
Court of the Third Circuit, Territory of Hawaii:

You Will Please Take Notice that in the above-
entitled cause the Supreme Court has entered the
following judgment on writ of error:

“In the above-entitled cause pursuant to the
decision of the above-entitled court, rendered
and filed on June 28, 1948, the writ of error
is dismissed.”

Dated Honolulu, T. H., June 29, 1948.

By the Court:

/s/ LEOTI V. KRONE,
Clerk.

The form of the foregoing notice is hereby ap-
proved, and It Is Ordered that the same issue
forthwith.

Dated Honolulu, T. H., June 29, 1948.

E. C. PETERS,
Associate Justice, Supreme Court, Territory of
Hawaii.

[Endorsed]: Filed June 29, 1948.

[59]

[Title of Supreme Court and Cause.]

ORDER RECALLING MANDATE

This matter having come on for hearing upon the application of the Defendant and Plaintiff in Error and good cause appearing therefor,

It Is Hereby Ordered that the Mandate heretofore issued on the 29th day of June, 1948, to the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, be and the same is hereby recalled.

Witness the Honorable S. B. Kemp, Chief Justice of the Supreme Court of the Territory of Hawaii, this 3rd day of July, 1948.

/s/ S. B. KEMP,
Chief Justice.

Attest:

(Seal) /s/ GUS K. SPROAT,
Clerk of the Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed July 3, 1948.

[61]

[Title of Supreme Court and Cause.]

Wednesday, June 16, 1948

ARGUMENT

The Court: Chief Justice Samuel B. Kemp, Associate Justices Emil C. Peters, Louis Le Baron. Mrs. Leoti V. Krone, Clerk.

Counsel: Tom Okino, Esq., County Attorney of Hawaii County, and Deputy Attorney General, for Territory, defendant-in-error. Ralph F. Matsumura, Esq., for plaintiff-in-error.

Court convened at ten o'clock a.m. on the above date, for argument in the above case, whereupon the said cause was called for argument.

Counsel for plaintiff in error announced that he would submit his case upon the opening brief but that if there was argument by the Territory he would ask leave to have five days within which to file a supplemental brief. The chief justice stated that his request would be held in abeyance until the court heard from counsel for the defendant in error.

Mr. Okino, attorney for the Territory, defendant in error, filed a motion to dismiss the writ of error on the ground that a writ of error does not lie to review an order revoking probation. He then proceeded to argue the motion to dismiss, concluding his argument at 10:24 o'clock a.m. He thereupon waived oral argument on the merits.

Mr. Matsumura, attorney for the plaintiff in error, waived argument on the motion to dismiss,

as well as upon the merits of the case, and submitted his case upon the briefs.

Court adjourned at 10:30 o'clock a.m., until tomorrow.

/s/ LEOTI V. KRONE,
Clerk.

Copy of Affidavit of Prejudice produced in No. 2710, Chillingworth vs. Pence et al, at argument June 7, 1948, filed in this record. [62]

[Title of Supreme Court and Cause.]

PETITION FOR APPEAL

Comes now Edwin B. Chillingworth, Petitioner, by his attorney, and deeming himself aggrieved by the judgment of this court made and entered in the above entitled cause on June 28, 1948, pursuant to the Court's opinion filed on June 28, 1948, dismissing his Writ of Error, prays that an appeal may be allowed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of cost bond that said Petitioner shall give and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit

Court of Appeals for the Ninth Circuit a transcript of the record, proceedings, exhibits and papers duly authenticated.

Dated at Honolulu on 2nd day of July, 1948.

/s/ RALPH F. MATSUMURA,
Attorney for Petitioner. [64]

Territory of Hawaii,
City and County of Honolulu—ss.

Ralph F. Matsumura, being first duly sworn on oath, deposes and says that he is the attorney for the Petitioner above named, that he has read the foregoing petition, knows the contents thereof, and that the same is true.

/s/ RALPH F. MATSUMURA,

Subscribed and sworn to before me this 2nd day of July, 1948.

/s/ T. OKALA,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires July 22, 1949.

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 2, 1948. [65]

[Title of Supreme Court and Cause.]

ASSIGNMENTS OF ERROR

I.

That the Court erred in dismissing Petitioner's Writ of Error, for lack of jurisdiction in that said Court does have jurisdiction of said cause.

II.

That the Court erred in dismissing Petitioner's Writ of Error in that the "Decision and Judgment" of the Circuit Court of the Third Circuit, Territory of Hawaii, dated and filed on July 30, 1947, from which appeal by Writ of Error was taken, was a "judgment of a Circuit Court" within of the meaning of Section 9551, R.L.H. 1945, governing Writs of Error.

III.

That the Court erred in dismissing Petitioner's Writ of Error in that the "Decision and Judgment" of the Circuit Court of the Third Circuit, Territory of Hawaii, dated and filed on July 30, 1947, from which appeal by Writ of Error was taken, was a "sentence of the court" within the meaning of Section 9551, R.L.H. 1945, governing Writs of Error. [66]

IV.

That the Court erred in dismissing the Petitioner's Writ of Error, for the reason that if the Writ does not lie, Sections 10843 through 10486, R.L.H. 1945, relating to probation and suspension, are unconstitutional in that they provide no method

of Appeal from the judgments and/or orders of the Circuit Court and are thus unreasonable and arbitrary in their application to him, depriving him of due process of law.

Wherefore, Petitioner Edwin B. Chillingworth prays that the judgment of the Supreme Court of the Territory of Hawaii, entered in the above cause on the 28th day of June, 1948, be reversed, and for such other and further relief as may be proper.

/s/ RALPH F. MATSUMURA,
Attorney for Petitioner.

[Endorsed]: Filed July 2, 1948.

[67]

[Title of Supreme Court and Cause.]

COST BOND

Know All Men By These Presents:

That Edwin B. Chillingworth, as principal, and James K. Parker and Ira K. Hutchinson as sureties, are held and firmly bound unto the Territory of Hawaii in the just and full sum of Two Hundred Fifty Dollars (\$250.00), legal currency of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

The condition of this obligation is such that:

Whereas, the above bounden principal, Edwin B. Chillingworth, has filed his Petition for Appeal

from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of said Supreme Court entered on June 28, 1948.

Now, Therefore, if said principal shall prosecute his appeal with effect and answer for all costs, if he fails to sustain said appeal, then this obligation shall be void, otherwise it remains in full force and effect. Sealed with our seals and dated at Honolulu, Territory of Hawaii, on July 1, 1948.

/s/ EDWIN B. CHILLINGWORTH,
Principal.

/s/ JAMES K. PARKER,
Surety.

/s/ IRA K. HUTCHINSON,
Surety.

AFFIDAVIT OF SURETIES

Territory of Hawaii,
City and County of Honolulu—ss.

James K. Parker and Ira K. Hutchinson sureties on the foregoing bond, being first duly sworn on oath, depose and say that they are residents of the City and County of Honolulu, Territory of Hawaii, and are each more than twenty years of age; that they have property situate within the Territory of Hawaii subject to execution; and that they are, each and not together, worth the sum of \$250.00 in such property situate within said

Territory of Hawaii over and above all their debts and liabilities and property exempt from execution.

/s/ JAMES K. PARKER,

/s/ IRA K. HUTCHINSON.

Subscribed and sworn to before me this 2nd day of July, 1948.

/s/ RALPH F. MATSUMURA,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires April 25, 1952.

The foregoing bond is hereby approved as to form, amount and sufficiency of Sureties.

/s/ SAMUEL B. KEMP,

Chief Justice, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed July 2, 1948.

[69]

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF BOND

Upon reading and filing in open court the petition of Edwin B. Chillingworth, petitioner above named, in which he prays that an appeal may be allowed from the judgment of this Court entered in the above entitled cause on the 28th day of June, 1948, to the United States Circuit of Appeals

for the Ninth Circuit, and upon said petitioner filing an Assignment of Errors together with said Petition and together with a Bond for Costs in the sum of Two Hundred Fifty Dollars (\$250.00).

It Is Hereby Ordered that said appeal be and it is hereby allowed; that the bond for costs in the sum of \$250.00 filed by said Edwin B. Chillingworth be and is hereby approved; and that said Petition for Appeal, Assignment of Errors, and Bond for Costs were filed in open court on the 2nd day of July, 1948, after the filing of said judgment; and this Order is now made allowing said appeal, all in open court in the Supreme Court of the Territory of Hawaii.

Dated Honolulu, T. H., July 2nd, 1948.

/s/ SAMUEL B. KEMP,

Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed July 2, 1948.

[70]

[Title of Supreme Court and Cause.]

CITATION

The United States—ss.

The President of the United States to Appellee and to its attorney Tom Okino, County Attorney of the County of Hawaii, Territory of Hawaii.

You are hereby cited and admonished to appear before the United States Circuit Court of Appeals

for the Ninth Circuit in the City of San Francisco, State of California, within forty (40) days from the date of this Citation pursuant to an appeal duly allowed and filed in open court by the Supreme Court of the Territory of Hawaii on the 2nd day of July, 1948, in the above entitled cause wherein Edwin B. Chillingworth is Appellant, and you, Territory of Hawaii, are Appellee, to show cause, if any, why the final judgment rendered against the said Edwin B. Chillingworth on June 28, 1948, should not be corrected and why speedy justice should not be made to the Petitioner in their behalf.

Witnesseth Samuel B. Kemp, Chief Justice of the Supreme Court of the Territory of Hawaii, this 2nd day of July, 1948.

/s/ SAMUEL B. KEMP,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Attest:

(Seal) /s/ GUS SPROAT,
Clerk, Supreme Court of the Territory of Hawaii.

[Endorsed]: Filed July 2, 1948.

[71]

[Title of Supreme Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

You will please prepare a transcript of the record of this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and include in said transcript the following pleadings and papers on file, to-wit:

1. The record on appeal from the Third Circuit Territory of Hawaii, other than the transcript of the testimony and the exhibits;

2. Defendant and Plaintiff-in-Error's Petition for a Writ of Error to the Third Circuit Court, Territory of Hawaii;

3. Defendant and Plaintiff-in-Error's Assignment of Errors accompanying the foregoing;

4. Writ of Error to the Third Circuit Court, Territory of Hawaii;

5. Decision of the Supreme Court of the Territory of Hawaii, dated the 28th day of June, 1948; [73]

6. Judgment on Writ of Error made and entered the 28th day of June, 1948;

7. Notice of Judgment on Writ of Error filed the 28th day of June, 1948;

8. Order Recalling Mandate;

9. Minutes of the proceedings before the Supreme Court of the Territory of Hawaii.

10. Petition for Appeal;

11. Notice of Appeal and Order Allowing Appeal;

12. Assignment of Errors;
13. Citation on Appeal;
14. Bond for Costs on Appeal;
15. This Praeceptum;
16. Clerk's Certificate of the Transcript;

Said transcript to be prepared as required by law, and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the Office of the Clerk of said Circuit Court of Appeals, at San Francisco, in the State of California, before the 7th day of August, A. D. 1948.

Dated at Honolulu, Hawaii, this 23rd day of July, 1948.

EDWIN B. CHILLINGWORTH,
Defendant-Appellant.

By /s/ RALPH F. MATSUMURA,
His Attorney.

[Endorsed]: Filed July 24, 1948.

[74]

[Title of Supreme Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, the time during which the Defendant-Appellant may file the records and exhibits specified in his Praeceptum, dated July 23, 1948, in the office of the Clerk of the

United States Circuit Court of Appeals for the Ninth Circuit is hereby extended to include the 29th day of September, 1948.

/s/ S. B. KEMP,

Chief Justice of the Supreme Court.

I do hereby certify that the foregoing is a full, true and correct copy of the original, on file in the office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Aug. 5, A. D. 1948.

(Seal)

LEOTI V. KRONE,

Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: Filed Aug. 5, 1948.

[74]

[Title of Supreme Court and Cause.]

SUPREME COURT CLERK'S CERTIFICATE

I, Leoti V. Krone, clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing documents listed in the index hereto attached are full, true and correct copies of the certified copies and of the originals on file in the above-entitled court and cause, and so indicated in said index.

I Further Certify that the cost of the foregoing

transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit is \$90.00, and that the said amount has been paid by the attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, this 26th day of August, 1948.

(Seal) /s/ LEOTI V. KRONE,
Clerk.

[75]

[Endorsed]: No. 12043. United States Court of Appeals for the Ninth Circuit. Edwin B. Chillingworth, Appellant, vs. Territory of Hawaii, Appellee. Transcript of Record. Appeal from the Supreme Court for the Territory of Hawaii.

Filed September 23, 1948.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 12043

TERRITORY OF HAWAII,

Defendant-in-Error,

vs.

EDWIN B. CHILLINGWORTH,

Plaintiff-in-Error.

(Error to Circuit Court, Third Circuit, Territory
Haw., Hon. Martin Pence, Judge, Cr. Nos. 2323
and 2413) Appeal from Supreme Court, Terri-
tory of Hawaii. No. 2687.

STATEMENT OF POINTS AND DESIGNA-
TION OF PARTS OF RECORD

Comes now Edwin B. Chillingworth, Appellant herein, by and through his attorney, Ralph F. Matsumura, and in compliance with Subdivision 6 of Rule 19 requiring a concise statement of the points on which Appellant intends to rely on the appeal, hereby adopts as the points on appeal the assignment of errors appearing in the transcript of the record, and in compliance with the rules of this Court pertaining to the designation of the portion of the record to be printed, directs that the entire record on appeal as set forth in the Praeceptum heretofore filed with the Clerk of the Supreme Court

of the Territory of Hawaii with the request that copies of the record as so designated be prepared and transmitted to this Court, be printed as the record on review.

Dated Honolulu, T. H., this 31st day of August, 1948.

/s/ RALPH F. MATSUMURA,
Attorney for Appellant.

Service of a copy of the foregoing Statement of Points and Designation of Parts of Record is hereby admitted this 1st day of September, 1948.

/s/ TOM OKINO,
Attorney for Appellee.

[Endorsed]: Filed September 23, 1948. Paul P. O'Brien, Clerk.

No. 12044

United States
Court of Appeals
for the Ninth Circuit

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

NOV 23 1948

PAUL P. O'BRIEN,

CLERK

No. 12044

United States
Court of Appeals
for the Ninth Circuit

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

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vs.

WALTER McDONALD,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Respondent and Petitioner.

WALTER McDONALD,

Box No. P.M.B. 602,
Alcatraz, California,

In Propria Persona. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the United States District Court for the Northern District of California, Southern Division

No. 28210

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The petition for Walter McDonald respectfully shows:

That he is illegally restrained of his lawful liberty by color of authority of the United States and in the immediate custody of E. B. Swope, warden of the United States Penitentiary, Alcatraz, California, which penitentiary is within the legal jurisdiction of this District Court.

STATEMENT OF FACT

Petitioner, on May 4, 1938, in the United States District Court for the Eastern District of Michigan, was indicted on six counts for violation of Title 12, Section 588 B, Subsections (a) and (b); all of which comprise a single charge of bank-robbery.

On January 25, 1939, petitioner was found guilty by jury. On January 26, 1939, he was sentenced

to the penitentiary in the custody of the Attorney General of the United States and to this day stands committed.

CONTENTION OF PETITIONER

That petitioner was deprived of his constitutional right to the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner is falsely, erroneously and unjustly charged with a very serious offense of which he is wholly innocent. Being ignorant in law and, during his trial, deprived of his constitutional right to the effective assistance of counsel, which necessarily precluded the [2] right of appeal, petitioner was unable to establish his innocence.

Petitioner was notified by the trial court on Monday evening, January 23, 1939, that his trial would start the following morning. He had no funds to employ counsel and the court would not appoint counsel; in support of which is an authentic copy of a letter incorporated within a sworn deposition by Honorable Judge Moinet, on page 13 thereof, attached hereto, made a part hereof, and marked petitioner's Exhibit A. (This was petitioner's first request to the court for counsel.)

The exhibits in cause Number 24885-S, now in the files of the clerk of this court, labeled depositions and marked Exhibits A, B and C, are adopted in this cause by reference and are to be incorporated and made a part hereof as though completely set forth herein and shall be designated and reference made thereto as Exhibits A, B, and C.

On the evening preceding his trial petitioner learned that one attorney George F. Curran had filed with the court clerk his notice of appearance as defense counsel on January 10, 1939. This was without the consent, knowledge or notification of petitioner; in support of which is an authentic copy of a sworn deposition by Attorney George F. Curran, at line 30, on page 14 thereof, attached hereto, made a part hereof, and marked petitioner's Exhibit C.

Petitioner thought at the time that the court had appointed this attorney to defend him. Petitioner promptly requested him to withdraw from the case. This, the said attorney refused to do. Exhibit C, page 15, line 12.

The following morning January 24, 1939, when court convened Atty. Curran made a motion for continuance so that he could prepare a defense; for at no time preceding the trial date has this said attorney notified or consulted with petitioner in an effort to prepare a proper structure of defense. This motion the court denied. Exhibit C, page 15, lines 21 to 26.

Whereupon petitioner arose and personally requested Judge Moinet in open court for other and unprejudiced counsel. Exhibit A, page 3, line 24; Exhibit C, page 7, line 24; Exhibit C, page 20, line 28. (This [3] was petitioner's second request to the court for counsel.) Petitioner explained that this said attorney, at that instant was awaiting trial before the grievance committee of the Michigan State Bar for professional misconduct; ExB)

and that petitioner was the prosecuting witness. Exhibit C, page 14, line 12.

This urgent request the court denied, Exhibit C, page 15, line 17, compelling petitioner to proceed immediately to trial with his personal enemy simulating a defender and without having made any preparation whatsoever for defense. Exhibit C, page 15, lines 21 to 26.

CONCLUSION

Petitioner having been denied the assistance of counsel for his defense in contravention of Amendment Six, United States Constitution, the trial court lost legal jurisdiction of said cause by reason thereof, during the proceedings to pronounce judgment. Therefore the judgment of conviction is invalid, void and of no effect, and petitioner is now unlawfully deprived of his liberty.

ITEM

This is the second application by petitioner for a writ of habeas corpus in this court wherein the same allegation is put in issue. On the first application the Honorable A. J. St. Sure granted petitioner's discharge without issuing the writ. (62 Federal Supplement 830.) The ninth Circuit Court of Appeals reversed. (157 F. (2) 275.) Hence, in effect and through no error of the District Court, petitioner has been denied a petition for a writ of habeas corpus without a hearing wherein a question of fact was raised, in violation of the rigid rule promulgated by the United States Supreme Court in *Walker v. Johnston*, 312 U.S. 275.

PRAYER

Wherefore, petitioner prays this Honorable Court to command Warden E. B. Swope, respondent herein, to discharge petitioner from further unlawful custody.

/s/ WALTER McDONALD,
Petitioner Pro se. [4]

AFFIDAVIT OF VERIFICATION

Personally appeared before me Walter McDonald who, after being first duly sworn, upon his oath deposes and says: that he is the petitioner in the above entitled cause; that he has read the contents thereof; and that they are true to the best of his knowledge and belief.

WALTER McDONALD,
Affiant and Petitioner.

Subscribed and sworn to before me this 6th day of July, 1948.

P. J. MADIGAN,
Associate Warden, United States Penitentiary, Alcatraz, California.

Warden-Associate Warden authorized by Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary Alcatraz, indicate that Walter McDonald is a citizen of the United States.

[Endorsed]: Filed July 24, 1948. [5]

Ninth Judicial Circuit of the United States

William Denman, Circuit Judge of the Ninth Circuit.

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE. Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER TO SHOW CAUSE

The petitioner having filed with me his petition for a writ of habeas corpus, and it appearing that he has filed a prior petition with the United States District Court for the Northern District of California, which petition was ultimately denied, and it appearing that the contentions of the petition to me require further consideration:

It is hereby ordered that E. B. Swope, Warden of the United States Penitentiary at Alcatraz Island, State of California, appear before me at 316 Post Office Building, San Francisco, on the 14th day of July, 1948, at the hour of 10 o'clock a.m. of that day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this

order be served upon the United States Attorney for this District, his representative herein, and that the Warden have with him Walter McDonald, there to present his case in propria persona.

WILLIAM DENMAN,
United States District Judge.

San Francisco, July 9, 1948.

[Endorsed]: Filed July 24, 1948. [6]

United States District Court, Southern Division,
Northern District of California

HABEAS CORPUS

The President of the United States of America

To: E. B. Swope, Warden, United States Peniten-
tiary, Alcatraz, California

Greetings:

You are hereby commanded, that the body of Walter McDonald by you restrained of his liberty, as it is said detained by whatsoever names the said Walter McDonald may be detained, together with the day and cause of being taken and detained, you have before the Honorable William Denman, Judge of the United States Circuit Court in and for the Ninth Judicial Circuit, at his Chambers, Room 316, Post Office Building, in the City of San

Francisco, Calif., at 11 o'clock a.m., on the 20th day of July, 1948, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness: the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, at San Francisco, California, this 14th day of July, A.D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: Filed July 15, 1948.

UNITED STATES MARSHAL'S RETURN

Northern District of California—ss:

Received the within writ this 14th day of July, 1948, and executed same on July 15th, 1948 by telephoning to and talking with Carl Sundstrom (Record Clerk at Alcatraz) who state Warden Swope would accept mail service . . . thereafter I mailed on 7-15-48 the original copy of this writ to Warden Swope at Alcatraz penitentiary.

GEORGE VICE,
U. S. Marshal,

By /s/ JAMES F. EAGAN,
Deputy Marshal. [7]

Ninth Judicial Circuit of the United States

William Denman, Circuit Judge of the Ninth Circuit.

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

RETURN TO WRIT OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for return to writ of habeas corpus, heretofore issued herein, respectfully shows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus was filed is detained by the respondent, E. B. Swope, as warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called the "trial court", in the case of United States of America vs. Walter McDonald, et al., Criminal No. 24742, on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its

opinion of January 10, 1944, reported in 139 F. (2d) 939 and transfer order dated May 15, 1943, issued at Washington, D. C. by direction of the Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That the trial Court had jurisdiction over petitioner and the offenses alleged in the indictment returned against him in said criminal cause number 24742;

III.

That respondent is informed and believes and further alleges that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the trial court;

IV.

That respondent is informed and believes and further alleges that petitioner was not deprived of any of his constitutional rights before the trial court;

V.

That the return to order to show cause heretofore filed herein is hereby referred to and incorporated herein as though set forth in full;

VI.

That in addition to the records referred to by respondent in his return to order to show cause,

which are also incorporated herein as though set forth in full, respondent also refers to and incorporates herein as though set forth in full, transcript of record on appeal before the United States Circuit Court of Appeals for the Sixth Circuit, No. 10581, in the case entitled "Walter McDonald, Appellant, v United States of America, Appellee", District Court Criminal Docket No. 24742, on appeal from an order entered on May 15, 1947, in the United States District Court for the Eastern District of Michigan, Southern Division, denying the motion of appellant to vacate judgment of conviction, together with per curiam opinion of the United States Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court, filed March 1, 1948. (. . . . F. (2d)).

Wherefore respondent prays that the petition for writ of habeas [9] corpus be denied and that the writ of habeas corpus, heretofore issued, be discharged.

Dated: July 20, 1948.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney, Attorneys for
Respondent.

[Endorsed]: Filed July 24, 1948. [10]

[Title of U. S. Court of Appeals and Cause.]

AMENDED PETITION FOR WRIT OF
HABEAS CORPUS

Your petitioner represents that

(1) On October 5, 1939, in the Eastern District of Michigan, he employed on a paid retainer one George F. Curran as his attorney to secure the "speedy" trial guaranteed him by the Sixth Amendment of the charges of an indictment returned in the United States District Court of that district on May 4, 1938, over five months prior to the employment of Attorney Curran. The indictment contained six counts charging violations of Title 12, Section 588 (6) subsections (a) and (b) respecting the robbery of the Federal Reserve Bank.

(2) Attorney Curran agreed to secure immediately a writ of habeas corpus to procure such a prompt trial so delayed for over five months, but failed to apply for the same at any time.

(3) On November 19, 1938, petitioner filed with the grievance committee of the Michigan State Bar Association his charges against Attorney Curran for malpractice in accepting a retainer to procure such prompt trial and failing to apply for such a writ of habeas corpus.

(4) At the times hereafter mentioned these charges remained unanswered before and undecided by the Michigan State Bar Association during all such time and particularly during petitioner's trial upon the charges of the indictment, in which Attor-

ney Curran acted as [11] attorney for petitioner, petitioner remained in hostility to Attorney Curran, as known by him, and justifiably assumed Attorney Curran was hostile to him by reason of petitioner's malpractice charge against him.

(5) It was apparent that if the trial were so conducted that petitioner were convicted, he would not be free to and could not conduct efficiently his malpractice proceeding against Attorney Curran. It was also apparent that if petitioner were found guilty, it would be urged as a justification of Attorney Curran's failure to secure a prompt trial. Nevertheless, Attorney Curran procured himself to become petitioner's attorney and acted as such attorney at the trial, in the manner hereafter described.

(6) Thereafter and two months after petitioner filed such charges with the Michigan State Bar Association and on January 10, 1939, Attorney Curran, without petitioner's knowledge or consent, entered his appearance as attorney for petitioner for petitioner's trial on the above indictment, which was set for January 24, 1939.

(7) It was not until the evening of January 23, 1939, that petitioner learned it was the purpose of Attorney Curran to be his attorney, despite the petitioner's charge of malpractice against him. On that evening, in the jail in the City of Detroit, Michigan, while conferring with another attorney, one Fitzgerald, for his defense at the trial on the following morning, Attorney Curran joined them and stated he was the petitioner's attorney. Thereupon Attorney Fitzgerald withdrew.

(8) Thereafter petitioner demanded of Attorney Curran that he withdraw as petitioner's attorney. Attorney Curran refused to withdraw stating to petitioner that he could not and would not ask to be discharged from the case but that, if petitioner wanted, he, the petitioner, could advise the court of Curran's refusal to withdraw.

(9) At the trial on January 24, 1939, after the jury was impaneled, petitioner advised the court of his disagreement with Attorney Curran and asked for the appointment of some other attorney. Thereupon, without asking the nature of the disagreement, the court refused to release [12] Attorney Curran and denied petitioner another attorney.

(10) The petitioner is a layman with no training at law and that it was the duty of the judge to inquire fully into the nature of the disagreement between petitioner, which would have disclosed the conflicting interests of Curran, accused of malpractice, and petitioner, his accuser.

As said in *Glasser v. United States*, 315 U.S. 60, 71, 75, a case of another kind of conflicting interest between attorney and client, though not as violent as here, where it was apparent that the attorney's interest might conflict with his client's, "The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

“To determine the precise degree of prejudice sustained by Glasser as a result of the court’s appointment of Stewart (Glasser’s Attorney) as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . . Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interest which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. . . .”

(11) Though listening to petitioner’s statement to the court of petitioner’s disagreement with Curran and his request of another attorney, and though knowing petitioner to be a layman, Attorney Curran did not advise the court then or at any time that his client was maintaining a malpractice proceeding against him and had previously asked him to withdraw and that he had refused to do so. [13]

In these circumstances, it was a gross violation of Attorney Curran’s duty to his layman client not to advise the court of petitioner’s malpractice proceeding against him. Attorney Curran, an officer of the court, was a part of the court. By his failure as such officer so to act and by the failure of the trial judge to act as above described, they prevented the creation of a court in which peti-

tioner could have such a trial as is required by the Sixth Amendment of the Constitution.

By such failure so to creat such a constitutional court, the acting court lacked jurisdiction to proceed with the trial of petitioner for, as said in said in Johnson v. Zerbst, 304 U.S. 458, 468, "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused to is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.' " (Emphasis supplied)

(12) So represented, the trial proceeded and the jury returned a verdict of guilty against petitioner on all the charges of the indictment. At the imposition of the sentence by the court, Attorney Cur-

ran did not attend there to represent petitioner. The court, on January 25, 1939, imposed a sentence in the absence of Attorney Curran of 35 years in the penitentiary, applying it generally to all six counts of the indictment. Thereafter, in June, 1943, the petitioner moved the court to set aside the sentence. The United States Attorney [14] conceded that he could be sentenced on but one of the counts of the indictment and that the sentence of 35 years was void. The court, on October 21, 1943, set aside that sentence and resentenced petitioner to 25 years in the penitentiary. *McDonald v. Moinet*, 139 F. 2d 939. The Warden now holds petitioner under the sentence for 25 years imposed on October 21, 1943.

(13) Attorney Curran, though believing petitioner had grounds for an appeal from the sentence of January 25, 1939, because of errors of law at the trial, took no action whatsoever to appeal from the judgment, which appeal he or some other counsel could prosecute for petitioner. For his failure so to act, Attorney Curran stated as his reason that no one provided him with a fee for procuring an appeal.

(14) Petitioner, imprisoned by reason of the sentence so procured, was unable to conduct his proceeding against Attorney Curran before the Michigan State Bar Association. Thereafter, Attorney Curran filed his statement in that proceeding and the charges were dismissed.

(15) Petitioner has heretofore filed a petition for a writ of habeas corpus in the Northern Dis-

trict of California which was ordered dismissed because it failed to state a cause of action. The identity of this case, as now pleaded in all essential features with Judge Denman's decision in *Wright v. Johnston*, 77 Fed. Supp. 687, makes a light burden in its consideration and is a special reason for asking him to consider it. Since it is the law of this circuit that individual judges of the District Court of the Northern District of California are not required to consider such petitions addressed to them and they file such petitions with the court to be considered by the court (*Burrell v. Johnston*, 146 F2d 230), the requirements of *Bowen v. Johnston*, 51 Fed. Supp. 717, of the prior filing of petitions to the individual judges are now applicable.

Wherefore, your petitioner prays that Circuit Judge William Denman order the issuance of a writ of habeas corpus to the above Warden, commanding the Warden to produce the body of petitioner before [15] Judge Denman, on July 20, 1948, at 10 o'clock a.m., at his chambers, 316 Post Office Building, San Francisco, together with a return stating the day and cause of petitioner being taken and restrained by the Warden.

WALTER McDONALD,
Petitioner.

(Verification.)

[Endorsed]: Filed July 24, 1948. [16]

In the Ninth Judicial Circuit

Before, William Denman, United States Circuit
Judge of that Circuit.

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Respondent.

ORDER

Misc. 132

To the Clerk of the United States District Court
for the Northern District of California:

It appearing from the amended petition of Walter McDonald for the writ of habeas corpus, the order to show cause why the writ should not issue, the return to the order and the traverse thereof by the petition accepted as traverse by the respondent, that due cause exists for the issuance of the writ to the respondent Warden, the Clerk of the United States District Court for the Northern District of California is ordered forthwith to issue the writ of habeas corpus addressed to the respondent Warden, ordering the Warden to produce the body of the petitioner, Walter McDonald, before me in my chambers, No. 316 Post Office Building, San Francisco, at the hour of 11 o'clock a.m. on Tuesday, July 20, 1948.

WILLIAM DENMAN,

United States Circuit Judge.

Dated: July 14, 1948.

[Endorsed]: Filed July 24, 1948. [17]

[Title of U. S. Court of Appeals and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent E. B. Swope, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called the "trial Court", in the case of United States of America vs. Walter McDonald, et al., Criminal No. 24742, on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its opinion of January 10, 1944, reported in 139 F. (2d) 939 and transfer order dated May 15, 1943, issued at Washington, [18] D.C. by direction of the Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That heretofore petitioner filed a petition for writ of habeas corpus before the District Court of the United States for the Northern District of California in case number 23414-S, which petition was denied; that on appeal the judgment of the lower Court was affirmed by the Circuit Court of Appeals for the Ninth Circuit in its opinion of April 2, 1945, reported in 149 F. (2d) 768; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

III.

That heretofore petitioner filed a petition for writ of habeas corpus in the District Court of the United States in case number 24885-S; that the said petition was granted and the petitioner remanded to the trial Court for further proceedings (62 F. Supp. 830); that the decision of the lower Court in case number 24885-S, reported in 62 F. Supp. 830, was appealed by the Government and on appeal the decision of the lower Court was reversed by the Circuit Court of Appeals for the Ninth Circuit in its opinion of August 30, 1946, reported in 157 F. (2d) 275, certiorari denied December 23, 1946, 329 U.S. 795; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

IV.

That heretofore and prior to his transfer to Alcatraz Island, California, by virtue of the aforesaid [19] transfer order dated May 15, 1943, petitioner filed a petition for writ of habeas corpus in

the District Court of the United States for the District of Kansas in the case of McDonald v. Hudspeth, Warden; that the said petition was denied and on appeal the judgment of the lower Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit in its opinion of July 26, 1940, reported in 113 F. (2d) 984; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

V.

That heretofore and prior to his transfer to Alcatraz Island, California, by virtue of the aforesaid transfer order dated May 15, 1943, petitioner filed a petition for writ of habeas corpus in the District Court of the United States for the District of Kansas in the case of McDonald, et al. v. Hudspeth, Warden, which petition was denied and on appeal the judgment of the lower Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit in its opinion of June 17, 1942, rehearing denied August 4, 1942, reported in 129 F. (2d) 196, certiarari denied, 317 U.S. 665; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

VI.

That the only issue cognizable in habeas corpus raised by the petitioner, to-wit, the alleged denial of the effective assistance of counsel, is similar to that raised and claimed by him in the habeas corpus proceedings set forth in paragraphs III, IV and V of this Return, set forth above. [20]

VII.

That in the habeas corpus proceedings referred to in paragraph II of this Return, above set forth, the Circuit Court of Appeals for the Ninth Circuit said in pertinent part as follows:

“In this (his fourth) habeas corpus proceeding, McDonald petitioned for the writ on the ground that his sentence was void because, at his (and Barnowski’s) trial, he was denied the assistance of counsel for his defense. Attached to and made part of the petition were copies of three depositions—a deposition of District Judge Edward J. Moinet, who presided at the trial, a deposition of Assistant United States Attorney John W. Babcock, who represented McDonald and Barnowski, and a deposition of Attorney George F. Curran, who defended them. Instead of showing that McDonald was denied the assistance of counsel for his defense, the depositions (which were part of the petition) showed that there was no such denial. Thus it appeared from the petition itself that McDonald was not entitled to the writ. Hence the petition should have been denied.

McDonald relies on *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680. There the trial court, over Glasser’s objection, appointed an attorney whom Glasser had employed for himself as attorney for Glasser’s codefendant, whose interests conflicted with those of Glasser. In the case at bar, Attorney Curran was employed by both defendants (McDonald and Barnowski). No Attorney was appointed for either of them. It was

not claimed or suggested that their interests conflicted. Hence the Glasser case has no relevancy here."

157 F. (2d) 275, 276;

VIII.

That in the habeas corpus proceedings referred to in paragraph V of this Return, above set forth, the Circuit Court of Appeals for the Tenth Circuit stated in pertinent part as follows:

"The trial court found that petitioners were represented by Mr. Curran, competent counsel of their own choice, and that they were not denied the assistance of competent counsel for their defense; that McDonald did not state to Judge [21] Moinet the nature of his disagreement with Curran, did not ask for a continuance, and did not request that another counsel be appointed; that Judge Moinet gave McDonald full opportunity to state the nature of his disagreement, but that the only statement made was that McDonald had had some disagreement with Curran; that no request was made by petitioners or their counsel for process for witnesses; that at no time during the trial did petitioners make any complaint to the court respecting the conduct of their defense by Curran; that McDonald did not state to Judge Moinet that he had filed charges against Curran with the Michigan State Bar Association; that petitioners were each afforded a fair and impartial trial; and that considering the volume of business in the District Court of the United States for the Eastern District of Michigan they were not denied the right to a

speedy trial. These findings are fully supported by the evidence;”

129 F. (2d) 196, 197, 198.

IX.

That also referred to and incorporated herein as though set forth in full is the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case of McDonald v. Moinet, (CCA-6), reported in 139 F. (2d) 939;

X.

That the respondent is informed and believes that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that the petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the said trial Court;

XI.

That respondent is informed and believes that petitioner was not deprived of any of his constitutional rights before the trial Court. [22]

Wherefore respondent prays that the petition for writ of habeas corpus filed herein be denied and the order to show cause, heretofore issued herein, be discharged.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

RESPONDENT'S MEMORANDUM OF
POINTS AND AUTHORITIES

Respondent respectfully suggests that there is no reason for his Honor United States Circuit Judge William Denman making an exception to the practice which he himself set forth in

Bowen vs. Johnston, 55 F. Supp. 340.

This petitioner should not be permitted to bypass the charges of the District Court of the United States for the Northern District of California. United States District Judges Louis E. Goodman, Michael J. Roche and George B. Harris of the Northern District of California have not as yet had a petition for writ of habeas corpus referred to them by the petitioner. It should be noted that United States District Judge A. F. St. Sure in case number 24885-S, referred to in Respondent's Return, granted petitioner's application for relief and it was the Circuit Court of Appeals for the Ninth Circuit which reversed Judge St. Sure and held that petitioner was not denied any of his constitutional rights and that his case did not fall within the framework of the [23] decision of the Supreme Court of the United States in

Glasser v. United States, 315 U. S. 60.

Certainly the petitioner can not complain that he has been treated unfairly by any of the District Judges of the United States for the Northern District of California.

In *Bowen v. Johnston*, *supra*, his Honor, Judge Denman, indicated that in the absence of any extraordinary circumstances, it would in effect be an interference with the ordinary administration of justice for a Circuit Judge to entertain a petition for writ of habeas corpus before the said petitioner had sought redress before the District Judges.

Accordingly respondent respectfully suggests that his Honor Judge Denman should not have entertained this petition. Furthermore, nothing can be accomplished by relitigating the issue of the alleged denial of the effective assistance of counsel. While *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, nevertheless no new issues are presented herein to justify the issuance of a writ as prayed for.

Swihart v. Johnston, (CCA-9), 150 F. (2d) 721, *Certiorari* denied, 327 U. S. 789.

The decision of the Supreme Court in

Price v. Johnston, No. 111, October term 1947, decided May 14, 1948, U. S. affords petitioner no comfort because in the *Price* case the issue involved was the right of a lower Court to refuse to entertain a petition for a writ of habeas corpus on the basis of a prior denial for writ of habeas corpus where new matter was raised.

Certainly there should be a finality to judgments. Respondent concedes that the petitioner is entitled to his day in Court but he has had that day in Court—the public is entitled to its protection too.

It is obvious that no useful purpose would be

served by the issuance of a writ of habeas corpus in this case and accordingly it is respectfully submitted that the same should be denied.

[Endorsed]: Filed July 24, 1948.

[25]

In the Ninth Judicial Circuit

Before William Denman, United States Circuit
Judge of that Circuit.

No. 28210

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Respondent.

IN HABEAS CORPUS

Denman, Circuit Judge:

Petitioner on the hearing of the order to show cause filed an amended petition, upon which the writ was issued. The Warden made his return and it was stipulated that the amended petition should be deemed petitioner's traverse to the return.

Hearing was had. The petitioner did not testify but offered in evidence the depositions of Judge Moinet, who presided at the trial on which petitioner was convicted, of United States Attorney Babcock, prosecuting him, and of George F. Cur-

ran, the attorney defending him. * Petitioner, without counsel, and Assistant United States Attorney Joseph Karesh argued the case and it was submitted.

On this evidence I find that each of the allegations of the amended petition is true and conclude that the Warden is holding the petitioner without warrant on a commitment on an invalid judgment.

OPINION

This is petitioner's third proceeding for a writ of habeas corpus. It presents a ground on which the facts were known to petitioner at the time of the filing of the prior two petitions, but concerning which petitioner "was unaware of the significance of [the] relevant facts."¹

* It was stipulated that the depositions were those appearing in the transcript in *McDonald v. Johnston*, No. 637, in the United States Supreme Court in the October Term 1946, Judge Moinet's in pages 7 to 23; Curran's at page 31, and Babcock's at page 55. Also stipulated in evidence are the letters from the Michigan State Bar at page 30, the memorandum and order of Judge St. Sure at page 73, and the opinion in the court of appeals at page 144.

¹The parties are agreed that the only relevant prior petitions are those in *McDonald v. Hudspeth*, 129 F. 2d 196 (CCA 10), and *McDonald v. Johnston*, 157 F. 2d 275 (CCA 9). It is agreed that the case of *McDonald v. Johnston*, 149 F. 2d 768 was upon an entirely different issue and that *McDonald v. United States*, 166 F. 2d 323 is not in the nature of *coram nobis*, though the Sixth Circuit relies on and reaches the same conclusions as the Tenth Circuit in *McDonald v. Hudspeth*, *supra*, later considered in this opinion.

There is no clearer case showing the wisdom of the decision of the Supreme Court in *Price v. Johnston*, U. S., decided May 24, 1948, in which it was said "In the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called [27] upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." (Emphasis supplied.)

The petitions filed in the two prior cases are a confused intermingling of allegations and attached exhibits which failed to set forth the contentions here urged. Petitioner, a layman, is one of those persons who, as stated by the Supreme Court in the *Price* case, "are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art

which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. Cf. *Holiday v. Johnston*, 313 U. S. 343, 350; *Pyle v. Kansas*, *supra*, 216; *Tomkins v. Missouri*, 323 U. S. 485, 487; *Rice v. Olsen*, 324 U. S. 786, 791-792." [28]

His petition before me was amended so that it states for the first time the later realized reasons and facts showing the failure to constitute a constitutional court for the trial in which he was convicted—particularly for the first time realizing that the duty of his attorney to tell the court the powerful interest of the attorney adverse to petitioner which made it clear that the attorney was disqualified to represent him. Once stated, the defect in the court protrudes like the "sore thumb" of colloquial speech.

I find and hold that here has been no abusive use of the writ.

The undisputed facts are that petitioner, then imprisoned under another sentence, was indicted with one Barnowski on charges of violations of 12 U.S.C. 588 (C), subsections a and b, respecting the robbery of a Federal Reserve Bank. There were six counts of the indictment on which petitioner, on January 24, 1939, was tried and on January 26th sentenced to a 35-year imprisonment, later reduced to 25 years.

The indictment on which he was convicted was

returned on May 4, 1938. There was a long delay in its prosecution. On October 5, 1938, petitioner employed one Curran, an attorney, to secure immediately a writ of habeas corpus to procure a prompt trial.

Believing Curran had not made such an application and that Curran was derelict in not doing so, petitioner on November 19, 1938, filed with the grievance committee [29] of the Michigan State Bar Association charges against Curran for malpractice in failing to apply for such a writ of habeas corpus. During all the relevant times thereafter and until March 10, 1939, that is after petitioner had been convicted and sentenced, petitioner's charges against Attorney Curran were pending before the Michigan State Bar Association.

Although petitioner was entitled to believe that his charges against Curran terminated any prior relationship of attorney and client, Curran, without advising petitioner, on January 10, 1939, entered his appearance as petitioner's attorney for his defense under the indictment under which he was subsequently convicted.

However, though in so attempting to assume the representation of petitioner, Curran attempted no contact with him to prepare his defense until the night of January 23—that is the night before the case was set for trial—when petitioner was consulting with another attorney for his defense. Curran stated that he was petitioner's attorney but did not obtain the names of any witnesses from peti-

tioner. The reason he then obtained the names of no witnesses for the defense at the trial beginning the next day is apparent from his testimony that "Well, there was a little bit strained feeling between McDonald and myself at that time. We did not have an awful lot of conversation. [30] I merely informed them that I would be in court the following day, as I had filed an appearance and would have to be there."

From the above facts I infer that there was a feeling of hostility between petitioner and Attorney Curran which Attorney Curran then realized by his failure to obtain the names of petitioner's witnesses.

On the morning of January 24, 1939, before the trial commenced, the differences between attorney and client continued and Attorney Curran said to the petitioner that "I could not and would not ask to be discharged from the case, but that if he [the petitioner] wanted he could so advise the court, which he did." Curran further testified: "Q. Did the court grant his request? A. It did not."

From Curran's false statement that he "could not . . . ask to be discharged from the case," it is apparent that the layman petitioner well could feel that he was entrapped for the trial of the case through an attorney purporting to represent him where, if convicted, the petitioner would be imprisoned and unable to prosecute his charge of malpractice against his attorney and where, in the malpractice hearing, his conviction could be offered

as a justification for the failure to seek the writ of habeas corpus for a prompt trial.

In these circumstances it is obvious that it was Attorney Curran's duty to advise the court of the [31] facts, to ask to be discharged from his representation of petitioner, and to ask for a continuance of the trial of petitioner until through the court or otherwise, an attorney was appointed without any adverse interest to his client.

The evidence is clear that instead of such action by Attorney Curran he did nothing, this being the testimony of both Judge Moinet and of the prosecuting attorney, whose depositions were taken and put in evidence before me.²

It is thus apparent that the essential element of the relationship of attorney and client, namely, mutual trust and confidence, was glaringly absent. Obviously no client in that situation would feel himself safe in communicating to such an attorney facts which would appear at the trial tending to incriminate him, but which could be controverted. If he gave him the names of witnesses to prove an alibi he would fear that such an attorney would fail to find them. [32]

²Curran's deposition states that petitioner fully stated to the court that petitioner was then proceeding against Curran in the malpractice proceeding. In accepting the statements of Judge Moinet and the United States Attorney that Curran's statement was untrue, it seems clear that Curran's false statement was because he realized the malodorous position he was in and wished to transfer the responsibility to the judge.

This interest of the attorney adverse to the client who was prosecuting him for malpractice is more marked than in the case of *Glasser v. United States*, 315 U. S. 60, for Glasser's attorney had an interest adverse to him merely because he represented another client in the same trial with a possible diverse defense. The failure of Glasser's attorney efficiently to represent him consisted of the condition of that attorney's mind because of his adverse interest of the other client. Here the adverse interest of the attorney infected the petitioner's mind with hostility because of the adverse interest in his attorney with respect to the charges pending against that attorney by his client and, unless the attorney had the mental skin of a rhinoceros, he then must have realized it. It is the condition of mind of attorney and client which determines the adverse interest.

On the morning of the trial on January 25th, at its beginning, the petitioner advised the court that there was a difference existing between himself and Curran. The testimony of the prosecuting attorney there present, is as follows:

“Q. Do you recall any conversation that occurred at the commencement of the trial relative to any statement made by the petitioner McDonald in court that morning?

A. I remember that when Court opened Judge Moinet asked if we were ready to proceed with the trial, and I advised him the Government was ready to proceed. I don't recall what response Mr. Cur-

ran made, but I recall that McDonald rose from his chair and said to the Court that he had been having some differences with his attorney and desired opportunity to obtain another attorney. But that was all that was said." (Emphasis supplied.)

On this Judge Moinet testified, as follows:

"Q. Was there any request made by Barnowski or McDonald or by Curran their lawyer, that you continue the case on that morning, a formal request?

A. No.

Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake it not, the jury was drawn and sworn, McDonald said he had some little disagreement with his attorney.

Q. Did he state the nature of that disagreement?

A. He did not; and the Court waited for some time for him to advise the Court of the nature of the difficulty. Mr. Curran said nothing and nothing further was said by McDonald or Barnowski in reference to that particular subject.

Q. So that you were never informed that morning, or at any subsequent time, as to what the nature of the alleged difficulties between Barnowski and McDonald and their counsel was?

A. I was not.

Q. Had anything been said in the Court that morning by McDonald or Curran, his attorney, to the effect that McDonald and Barnowski had filed any charges with the Bar or Bar Association of Michigan against their attorney, George Curran?

A. There was not; and I never heard of the subject until yesterday and that was from you and the United States Attorney who tried the case, Mr. Babcock." (Emphasis supplied.)

It thus appears that Judge Moinet was advised that there was a difference between attorney and client and that instead of inquiring the nature of the differences he waited for the layman petitioner to expand them. In this connection it is pertinent that Curran had told petitioner that he "could not" request a discharge, from which petitioner well could conclude that Curran had a right to continue as petitioner's attorney and that it was futile to attempt to remove him. [34]

While the court was waiting for the development of the differences between petitioner and Curran, it became more emphatically Curran's duty to advise the court fully of the circumstances and ask to be discharged from the case. Instead, as testified by Judge Moinet, "Mr. Curran said nothing," and the testimony of the United States Attorney that nothing of the kind was said.

At this time the law had not been declared as it was later in *Glasser v. United States*, *supra*, and, quite likely, had I been in Judge Moinet's position I would not have inquired and would have

waited and, in the absence of further information, would have continued with the trial with Curran as petitioner's attorney.

However, the Glasser case makes it clear that in such a situation it is the duty of the judge not to remain silent but to interrogate both attorney and client as to the nature of the differences between them. As the court there stated, at page 71, "The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

If this is true of Glasser, an attorney, it is true a fortiori of petitioner, a layman. The Glasser [35] rule is an application to the case of the continuance of a disqualified counsel of the court's duty with respect to the waiver of counsel stated in *Johnson v. Zerbst*, 304 U. S. 458, 465,

"This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

If the judge so had attempted to ascertain the relationship of this attorney with his client, his own statement of what would have happened is apparent from his testimony, as follows: "If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and if I had been satisfied that their differences were of such a nature that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed their counsel, for them, had they shown their inability to procure counsel." Had the judge so acted there necessarily would have been a substitution of attorneys and a continuance to enable the substitute attorney to conduct petitioner's defense.

From the above facts I conclude that no constitutional court had been formed for petitioner's trial under this indictment. There are three essentials to constitute such a court: the judge, the attorneys who are officers of the court, and the jury. Here, clearly, [36] there was no attorney who could give efficient aid as counsel.

This is true, even though no statement had been made to the court. Because the layman petitioner attempted to get the facts before the court but did not succeed without the aid of Attorney Curran or otherwise, does not create in the court its constitutional character. However, to this is added the failure of the court to inquire when advised that differences existed. Thus it is clearer that

petitioner was deprived of his constitutional right and that the trial and the judgment following such a trial must be declared without the jurisdiction of the court and void.

This does not mean that whenever the court at the beginning of a trial is told a dispute exists between an accused and his attorney that there must be a continuance and a substitution of another attorney. It means no more than that the judge must inquire into the nature of the dispute, as Judge Moinet says he would have done. This is what was done by the trial judge in *United States v. Gutterman*, 147 F. 2d 540 (CCA 2), where Judge Augustus Hand's opinion sets forth all the colloquy showing the nature of the differences between the attorney and client and upheld (Judge Frank dissenting) the trial court's continuance of the trial with that attorney. Similarly the full evidence was stated in *United States v. Mitchell*, 138 F. 2d 83 (CCA 2). In neither case was the difference on where the client [37] could feel that if he were convicted his attorney would be greatly aided in defending his client's malpractice proceeding against him.

The Warden contends that the *Glasser* case requires that, despite such disqualification, something more in the way of prejudice must be shown in the preparation for or in the conduct of the trial. In this I cannot agree. Enough may be inferred from the relationship of the client in the then pros-

ecution of his self-enforced attorney for a prior malpractice. However, further prejudice clearly appears.

On the opening of the trial, Curran had obtained the names of no witnesses for petitioner's defense. It was clearly his duty to move the court for a continuance so he could consult with these witnesses and be prepared to cross-examine the government's witnesses as the prosecution of the case developed. No self-respecting attorney for a client charged with an offense so serious that conviction meant at least a 25-year imprisonment would fail to ask for such a continuance. Yet the testimony of Judge Moinet, all of which I believe, is that Curran asked for no such continuance.

What the precise amount of prejudice this failure to procure a continuance produced, I am not required to measure, for the Glasser case states at page 75,

“To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart [Glasser's attorney] as counsel for Kretske is at once difficult and unnecessary. The right to have [38] the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts*, 291 U. S. 97, 116; *Tumey v. Ohio*, 273 U. S. 510, 535; *Patton v. United States*, 281 U. S. 276, 292. And see *McCandless v. United*

States, 298 U. S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. . . ." (Emphasis supplied.)

Here, concurrently with representing petitioner, was the violation of the duty of counsel to be free of an interest not only "which might diverge from those of his . . . client" but which in fact fundamentally diverged from those of his client.

In my opinion, the failure to secure a continuance was as much a denial of due process by the attorney as there was a denial of due process by the court in *Powell v. Alabama*, 287 U. S. 45, where the Court states at page 71 that the duty to provide counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

The failure of the court here to inquire into the

nature of the dispute led to such an unprepared trial. I could have ordered the petition amended to [39] add this further denial of due process to conform to this proof. However, I consider that unnecessary since it proves petitioner's contention that the absence of effective representation of counsel caused him prejudice.

The Warden contends that a court loses jurisdiction by the absence of an effective defending officer only by some positive act of the court itself. In this I disagree. The failure of the court to ascertain the nature of the attorney's adverse interest is sufficient. Further it is my opinion that if nothing had been stated to the court, it nonetheless could be shown that it had lost jurisdiction. Certainly in a habeas corpus proceeding it could be shown that the court lost jurisdiction where its defending officer had been bribed by the enemy of his client to secure his client's conviction. As stated, the attorneys, the court's officers, are as much a part of a fully constituted court as are the judge and jury.

The Warden relies strongly on the decision of the Circuit in *McDonald v. Hudspeth*, 129 F. 2d 196, 198. There the court found that "two days before the trial, Curran consulted petitioners [there was a co-defendant also represented by Curran] at the county jail. Their defense was discussed and Curran advised them that he would appear for them at the trial. They did not advise him that they did not desire him to represent them, although some

feeling existed between McDonald and Curran.”

Here, the testimony of Curran is to the exact contrary that “There was some talk the date of the trial about my representing Mr. McDonald, and I told him at that time that I could not and would not ask to be discharged from the case, but that if he wanted he could so advise the Court, which he did. Q. Did the Court grant his request? A. It did not.”

I cannot believe that if this had been found by the Tenth Circuit, it would have held that Curran did not violate his obligation to petitioner to supplement the statement of his layman client by telling the court that his client was prosecuting him for malpractice. Whether or not the malpractice charge was well founded is irrelevant. What is relevant is that petitioner did not want Curran because of the pending prosecution of that charge. Furthermore, the Tenth Circuit’s opinion, in approving Curran’s conduct, states (page 198), “Curran discussed the question of an appeal with petitioners. Barnowski agreed to raise the funds for the appeal from his friends and relatives. The funds not being forthcoming, the appeal was abandoned.”

On the contrary, Curran’s testimony before me is that he never filed a notice of appeal, although he felt the court had erred in rulings warranting the appeal. The testimony is “Q. And do you have an opinion as to whether or not they had a fair trial in the courtroom? A. It is a question of

whether my viewpoint [41] of the law coincides with the trial judge's. I may be wrong, and I wouldn't want to state on that. Q. The matter you refer to in your answer is a question of interpretation of rulings of the Court on law? A. Rulings of the Court on law." And, "Q. Did you write a letter directed to defendant Barnowski at the United States Penitentiary at Leavenworth, Kansas, under date of May 3, 1939, with a request of two hundred dollars to further finance his appeal? A. I believe I did. Q. Is it true that the legal time limit for filing of appeal expired March 18, 1939? A. I don't remember the dates that this took place. Q. Is it true that you never filed a notice of appeal in case No. 24,742? A. I believe that is right."

Curran's claimed attitude towards petitioner is that, though he was paid nothing but \$25.00, it was his intent to do everything for his client. Yet, though claiming grounds for an appeal, he failed to do the simple thing of preparing one page of writing and filing a notice of appeal. By this failure it became certain that no other attorney could take an appeal and petitioner's conviction could be urged before the Michigan State Bar Association. The evidence before me does not warrant the approval of Curran's conduct given him by the Tenth Circuit.

The Warden also relies on the decision of this Ninth Circuit in *McDonald v. Johnston*, 157 F. 2d 275. There the court reversed the decision of

District Judge St. Sure, who had ordered the petitioner's release and return to Michigan for further proceedings. The ground [42] of the reversal is that the petition failed to state a cause for the writ. The petition was in the same confusion of intermingled allegations and incorporation of testimony as the original petition before me. Nowhere does it claim, as in the amended petition, that it was the failure of Curran to advise the court that his client was prosecuting him and that it was the failure of the court to make certain the nature of the disagreement which constituted the gravamen of the failure to create the constitutional court.

This is clearly apparent from the following statement at page 276, "McDonald relies on *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680. There the trial court, over Glasser's objection, appointed an attorney whom Glasser had employed for himself as attorney for Glasser's co-defendant, whose interests conflicted with those of Glasser. In the case at bar, Attorney Curran was employed by both defendants (McDonald and Barowski). No attorney was appointed for either of them. It was not claimed or suggested that their interests conflicted. Hence the *Glasser* case has no relevancy here."

If this is what the petition before that court presented as its ground for relief, that decision is correct. The exact contrary appears in the amended petition before me. No contention is here made of a conflict of interest between petitioner

and his codefendant. As stated, the Glasser case is controlling because of a deeper adverse interest between attorney and client, a personal interest of the attorney under prosecution by his client. [43]

Respecting the order to be made on the conclusion of law that the Warden is holding the petitioner on a commitment on an invalid judgment, because the petitioner has not had a constitutional trial, petitioner contends that it should be that he be discharged absolutely from the custody of the Warden, the agent of the Attorney General. The law is clearly to the contrary. This is not a case in which it is claimed that the indictment is invalid. It still exists. Petitioner's contention is that he has never been tried on the indictment has been sustained. He fails to distinguish between jurisdiction to conduct the particular trial and the jurisdiction obtained by the court through the indictment. The latter jurisdiction remains and if the United States be so advised it may require the court to exercise its jurisdiction to conduct a trial under the indictment. Under petitioner's contention, this would be his first trial under the indictment.

That the United States has such right to try the accused where a first trial has been held without the court's jurisdiction to conduct it is apparent from the following cases, of which the leading case is *In Re Bonner*, 151 U. S. 240, 262. There the Court held, as is held of the judgment after the trial here, that a judgment sentencing to a state

penitentiary a man adjudged guilty of a federal offense, was without the jurisdiction of the court rendering it. The petitioner contended, as does petitioner here, that he [44] should be discharged "absolutely" because of such lack of jurisdiction to render the judgment. The Court held to the contrary and in ordering the release of the petitioner from the custody of the Warden, stated, "but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with the law upon the verdict against him."

In *Robinson v. United States*, 50 F. Supp. 774, Robinson, who had a life sentence for kidnapping, petitioned for the writ of habeas corpus. It was held, as here, that the judgment was invalid because there had been no trial with the effective assistance of counsel. The district court ordered Robinson returned to the Kentucky court, where the indictment was pending, for further proceedings. He was tried on that indictment and sentenced to be hanged. *Robinson v. United States*, 324 U. S. 282.

In *King v. United States*, 98 F. 2d 291, 295 (C.A.D.C.), it is held that an accused who attacks a judgment sentencing him for a term of years and has it set aside, may be again convicted and sentenced for life. There is no difference between an attack on appeal and on habeas corpus. The indictment is still there on which the trial is to be held. The same was held in *McCleary v.*

Hudspeth, 124 F. 2d 445, 447, a habeas corpus proceeding. See also, *In Re Medlie*, 134 U. S. 160, 170, where the release in the habeas corpus proceeding was delayed for ten days with notice to the Attorney General so that he would be [45] free to take further proceedings if so advised.

Whatever may have been petitioner's past record, he conducted his case here with unusual candor and intellectual integrity. During a colloquy it appeared that although he is now entitled to petition for release on parole, he was seeking release on the writ under the mistaken impression that it would be "absolute" and that he could not be retried. Attorney Karesh, who represented the Warden with ability and vigor, with his usual fairness to his opponent was careful to advise petitioner that, if petitioner succeeded before me, in all likelihood he would be retried.

ORDER OF DISCHARGE

The respondent Warden is ordered to release petitioner from his custody. This order is stayed for thirty days to enable the Attorney General to take such action with respect to further prosecution on the above indictment as he may be advised.

WILLIAM DENMAN,

United States Circuit Judge.

San Francisco, July 24, 1948.

[Endorsed]: Filed July 24, 1948.

[46]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF APPEAL

Notice is hereby given that E. B. Swope, Warden of the United States Penitentiary, Alcatraz Island, California, respondent in the above-entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order and opinion of the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, discharging the petitioner, made and entered in the above-entitled action on July 24, 1948.

Dated August 18th, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Aug. 18, 1948.

[47]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL UNDER RULE 75(a)

E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, respondent appellant herein, hereby designates the complete record and proceedings in the above-entitled cause, including all exhibits, for inclusion in the record on appeal.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,

Attorneys for Respondent-Appellant E. B. Swope,
Warden, United States Penitentiary, Alcatraz,
California.

[Endorsed]: Filed Sept. 3, 1948.

[48]

Ninth Judicial Circuit of the United States

William Denman, Circuit Judge of the Ninth
Circuit.

No. 28210

WALTER McDONALD,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California.

Present: Walter McDonald, in propria persona.
Joseph Karesh, Esq., Assistant United States At-
torney, for the Respondent.

REPORTER'S TRANSCRIPT

Tuesday, July 20, 1948

11:00 a.m.

Mr. Karesh: May I proceed, your Honor?

The Court: Very well.

Mr. Karesh: I think, your Honor, in the in-
test of saving expense in the printing up of a
transcript we might here state the record as it
now exists. There was a petition for writ of habeas
corpus heretofore filed by the petitioner. An order
to show cause issued, and in the order to show
cause your Honor directed that the petitioner be
present and the petitioner was present, at which
time we filed on behalf of the respondent a return
to the order to show cause.

Thereafter, the petitioner filed an amended peti-

tion for a writ of habeas corpus and it was deemed that our return to the petition for writ of habeas corpus would also be the return to the amended petition for writ of habeas corpus. It was then stipulated that the petition would be deemed as the traverse to the return to the order to show cause.

Thereafter, your Honor, after argument, issued an order directing the Clerk to prepare a writ of habeas corpus, which writ was so prepared by the Clerk. The writ was made returnable today before your Honor at 11:00 o'clock.

At this time, may it please the Court, we ask leave to file a return to the writ of habeas corpus, which merely incorporates by reference everything that was contained in the return to the order to show cause. There is paragraph 6, which mentions, your Honor, the proceedings before the Circuit Court of [50] Appeals for the Sixth Circuit in case 10581, which is incorporated by reference here.

The Court: Let me ask you, what is the purpose in incorporating this proceeding before the courts in Michigan?

Mr. Karesh: It has no real relevancy, except, if your Honor please, if we were to offer certain depositions they could be taken out of that proceeding.

The Court: I have examined this return. I wish you would take a look at it.

Mr. Karesh: I have secured a copy.

The Court: All right. Get your copy and take a look at it.

Mr. Karesh: No, I did not bring mine down but I have examined it.

The Court: Take this (handing a document to counsel). This is a copy furnished to us by the petitioner.

The Petitioner: Pardon me, please. It is not a certified copy.

The Court: That does not make any difference. At the last meeting, in order to avoid the time and expense of getting a certified copy, you offered this and it is here now. Are those the depositions that you desire to have introduced in evidence here?

Mr. Karesh: Yes. May I make this observation, your Honor: I do not think I came to the part where we will [51] incorporate into the record the stipulation of last week at the calling of the case, the stipulation that the petition will now be deemed to be the traverse to the return to the writ of habeas corpus; that is correct, isn't it, Mr. McDonald?

The Court: That is correct. That is what he agreed to the last time.

With reference to that, since you want to shorten the record, I call your attention to page 80 of the document that you have in your hand. Do you want that in evidence?

Mr. Karesh: I may say this, your Honor, that instead of referring to this document here, it would

be simpler to send it over, if the case goes up on appeal, to the Clerk of the Circuit Court of Appeals if we refer to No. 11,210, entitle Johnston v. McDonald and McDonald v. Johnston. That has the document itself.

The Court: I call your attention to page 7. Do you want the deposition of Judge Moinet?

Mr. Karesh: It is my understanding the burden of going forward is on the petitioner. He desires to offer it. We have no objection.

The Court: That deposition includes long letters of Barnowski. Are they relevant?

Mr. Karesh: That is up to Mr. McDonald.

The Court: Do you want to put in letters of Barnowski?

The Petitioner: I do not believe they are directly [52] relevant, other than to show a situation, and preferably if there is no objection, I believe they should be in.

Mr. Karesh: I have no objection, your Honor.

The Court: That means the entire deposition of Moinet.

Mr. Karesh: With the attachments.

The Court: Yes.

Mr. Karesh: May I say for the sake of the record that deposition appears at page 7 and runs through page 31. Of course, he has Exhibit B. I do not know whether, Mr. McDonald, Exhibit B was part of Mr. Moinet's deposition or was not. That goes from page 7 through page 30. Now, there is an exhibit B, Mr. McDonald, which is a

letter from the Bar Association to yourself under date of April 28, 1945, appearing at pages 30 and 31 of the transcript. Do you wish that letter in?

The Petitioner: Yes, sir.

Mr. Karesh: We have no objection to that going in and being marked Exhibit B on behalf of the petitioner.

The Court: On page 31 there is a deposition of George F. Curran and on page 55 is a deposition of John W. Babcock. Do I understand that you offer those, too?

The Petitioner: Yes, sir.

Mr. Karesh: They appear in this transcript as one exhibit.

The Court: Beginning at page 31.

Mr. Karesh: Beginning at page 31 of this transcript in No. 21110 of the United States Circuit Court of Appeals for the [53] Ninth Circuit; Mr. Curran's runs from page 31 through page 55.

The Court: Are you including all the certificates of the officers and so on?

Mr. Karesh: Yes, because that would show they are in effect accurate documents, your Honor.

The Court: Can you say duly certified, then, and save that amount of space in your record?

Mr. Karesh: It is very little, just a few lines. It runs from 31 through 55, Mr. McDonald, the deposition of Mr. Curran, and the deposition of Mr. Babcock runs from page 55 and continues from 55 through 68. Do you desire to offer those?

The Petitioner: As Exhibit C.

Mr. Karesh: I think that would be Exhibit C, one exhibit.

The Petitioner: That is correct.

Mr. Karesh: I think at this stage of the proceedings, your Honor, it should be noted that those depositions were taken in the case of McDonald v. Hudson before the District Court of Kansas, and the case was appealed and was reported in 129 Fed. 2d. 196. That is correct, isn't it?

The Petitioner: Other than that I might say the depositions were taken for the District of Kansas but were taken—

Mr. Karesh: They were taken in Detroit?

The Petitioner: That is correct.

Mr. Karesh: But were offered in those proceedings. These appear as part of the proceedings that went upon appeal in [54] McDonald v. Hudspeth, 129 Fed. 2d. 196.

Have you any other documents?

The Court: On page 73 is the memorandum and order of Judge St. Sure. Do you desire to offer that?

The Petitioner: Yes, sir.

The Court: And then on page 144 is the opinion of the Circuit Court of Appeals of the Ninth Circuit. I presume I could take judicial notice of that, but do you offer that?

The petitioner: If relevant.

Mr. Karesh: If your Honor please, if he is going to offer the memorandum, he would perforce have to offer the opinion in the entire matter.

The Court: It is a memorandum and order of Judge St. Sure, as entitled on page 73, but the whole thing is there.

Mr. Karesh: I do not think that is relevant, your Honor, because if counsel offers that opinion we could then incorporate into the record and ask that be read into the record all these other opinions. I think they have no relevancy. This is a new habeas corpus hearing in which we are taking testimony, so I would move that that be stricken as having no relevancy here whatsoever.

The Petitioner: I object.

The Court: You mean the opinion of the Circuit Court of Appeals?

Mr. Karesh: I mean the memorandum of Judge St. Sure has [55] no more relevancy than the opinion of the Circuit Court of Appeals.

The Court: Then you agree there is no abusive use of the writ here?

Mr. Karesh: Oh, no, I can not concede that. I say in a habeas corpus proceeding, this is a new proceeding—

The Court: The only ground upon which there could be an abusive use of the writ would be where the same contention has been urged and so on.

Mr. Karesh: No, that is brought into the picture on the return to the order to show cause but not on the return to the writ.

The Court: There is no contention made in the

return to the order to show cause of the abusive use of the writ. Either it is here or it is not.

Mr. Karesh: Your Honor has found that there is no abusive use of the writ and that is purely within your Honor's discretion.

The Court: I have never found that there was no abusive use of the writ.

Mr. Karesh: By issuing the writ of habeas corpus, your Honor has in fact declared that there is no abuse of the writ.

The Court: I did not so hold and I do not so regard it. Do you contend that there is an abusive use of the writ here?

Mr. Karesh: Yes ,I do. [56]

The Court: Very well, then we will receive the offer of the opinion of the Circuit Court of Appeals of the Ninth Circuit, and we will take judicial notice of the decision of the Circuit Court of Appeals in 129 Fed. 2d. 196, which has been referred to by counsel heretofore.

Mr. Karesh: And does your Honor take judicial notice of the opinion of our Circuit Court which overruled Judge St. Sure?

The Petitioner: May I enter an objection to his statement, declaration, that he holds that this is an abusive use of the writ?

The Court: Yes. You object to that. You contend there is no abusive use of the writ.

The Petitioner: May I offer an additional statement with respect to that?

The Court: In due time, yes. We are getting now a record.

Mr. Karesh: Does your Honor take judicial notice of this transcript on appeal, No. 10581, United States Circuit Court of Appeals for the Sixth Circuit from the District Court, Criminal Docket 24742, Walter McDonald, Appellant, v. United States of America, Appellee?

The Court: No, for the reason that that was not a habeas corpus proceeding in which the writ could have been abused.

Mr. Karesh: Under those circumstances, then, we say [57] nothing further about that No. 10581.

The Court: Is that offered in evidence now that you have this other material in?

Mr. Karesh: No, I am not going to offer it, your Honor. Your Honor refuses to take judicial notice and there is no use to press it further.

The Court: The reason for my statement that I will not take judicial notice of it is because it is not a habeas corpus proceeding, and I understand that you do not offer it as a habeas corpus proceeding in which the writ might have been abused.

Mr. Karesh: I think your Honor is correct and we gladly abide by your Honor's ruling.

If your Honor please, we are, of course, going to have to offer as Respondent's Exhibit the minute and docket entries, the indictment and so forth, but I think before we do that the petitioner has something else he wishes to offer. If he does, he may proceed. Or perhaps at this juncture—

The Court: One moment. He has recited in his petition that he was convicted under an indictment and describes the indictment. Do you want anything further than that?

Mr. Karesh: Yes, your Honor. I feel that they should be offered as a respondent's exhibit, and we are doing it out of turn—if you will turn to page 99, if your Honor please, of the transcript in 11210, to which we have already referred— [58]

The Petitioner: I think the same rule is required in both of those.

The Court: Admitted.

Mr. Karesh: So that the record may be clear, your Honor, that exhibit was originally offered and may be found in case 23414-S. It was incorporated by reference in case 24885-S, the case which your Honor has already referred to, the case in which Judge St. Sure ordered the release of the petitioner, and so as Repsondent's Exhibit A we will offer the documents to be found on page 99 of the transcript, consisting of the indictment, which runs from page 9 through 105, the plea, 106, the documents on 107, 108, 109—

The Court: Wait a second. Do you want 107?

Mr. Karesh: Yes. In fact, we will offer the whole of Respondent's Exhibit A, which runs from page 99 through page 119. That, of course, consists of the original Respondent's Exhibit A. That was offered in 23414-S and incorporated by reference in 24885-S. You are familiar with that; that contains the indictment, docket entries, judgment,

transfer to Alcatraz, and the record of his court commitment at Alcatraz. That would be Respondent's Exhibit A.

The Petitioner: Yes.

Mr. Karesh: I may ask your Honor at this time to take judicial notice of the opinion of the Circuit Court of Appeals for the Sixth Circuit, reported in 139 Fed. 2d. 939. That is [59] the order that reduced petitioner's sentence, the order of the Circuit Court of Appeals. I trust you have no objection to that.

The Petitioner: I object.

The Court: Can't we clean up this by saying that it is stipulated that the sentence originally imposed by Judge Moinet was for 35 years, and that in subsequent proceedings it was reduced to 25 years?

Mr. Karesh: By the Circuit Court of Appeals for the Sixth Circuit, yes, your Honor, and reported in 139 Fed. 2d. 939. Is that correct?

The Court: That is correct. That is what happened, wasn't it?

The Petitioner: I do not agree exactly with that. As a matter technical, I would say yes.

The Court: Isn't it a fact that in the original sentence imposed by Judge Moinet the sentence was 35 years?

The Petitioner: That is correct.

The Court: Thereafter in proceedings had before Judge Moinet the sentence was reduced to 25 years?

The Petitioner: No, I can't agree, Judge. I was sentenced to begin that day, which really did not reduce it only about five years and three months.

Mr. Karesh: That is McDonald v. Moinet, 139 Fed. 2d. page 941. Here is what it says: [60]

"The petitioner will be entitled to the benefit of all rules and regulations and good time credits as if the valid resentence of 25 years imprisonment had been pronounced on January 26, 1939, the date of the original void sentence."

The Court: Was there any appeal from that?

Mr. Karesh: This is in the appeal.

The Court: Any certiorari on that?

The Petitioner: There was?

The Court: Was it denied?

The Petitioner: Yes, your Honor, on these grounds: the Attorney General cited before the Supreme Court that the District Court was wrong in vacating the sentence, and the Circuit Court was wrong in affirming it, and that Mr. Bent had had at that time ordered the Department of Justice and those concerned to set the sentence back to begin at the original date, as the first sentence was imposed. Therefore the petitioner had not been prejudiced, and in view of this fact, would the Supreme Court deny certiorari? But no order was issued by the authorities which set that court order back. It still stands today as a court order, and I am doing 29 years and 9 months.

The Court: Let me ask you, are you now im-

prisoned under the sentence no matter when it begins?

The Petitioner: Yes, sir. [61]

The Court: That is the only question before me.

Mr. Karesh: That is correct. I just wanted to put that in the record, if the Court please, in case perchance he might—

The Court: One moment. The assistant of the warden is here. How does the record stand with reference to the date when the prisoner's sentence begins to run, do you know?

Mr. Karesh: This is Mr. Carl Sundstrom, the record clerk of Alcatraz.

Mr. Sundstrom: Our records show Mr. McDonald's sentence began back at the original date of sentence.

Mr. Karesh: 1939.

Mr. Sundstrom: As 25 years, yes.

The Court: From 1939?

Mr. Sundstrom: Yes. That was our instructions from the Department of Justice.

Mr. Karesh: And our record will show, too, your Honor, a 25 year sentence that runs from 1939.

The Court: That is not relevant to this inquiry at any rate. If he is improperly imprisoned today, he may seek release on the basis of the claim in his petition.

Mr. Karesh: The alleged denial of the effective assistance of counsel.

(Off the record discussion.)

The Court: We have here the depositions of Moinet, Curran and Babcock. Is there any further evidence that you want [62] introduced to support your petition?

The Petitioner: I think it advisable the evidence of the petitioner himself.

The Court: What is that?

The Petitioner: The evidence of the petitioner himself.

The Court: You can submit it on the evidence of other persons and not have the testimony of yourself at all here.

The Petitioner: What has led me to this position is this point—

The Court: You have a trial now pending. You have evidence offered to support your petition.

The Petitioner: That is correct.

The Court: You are not required to testify if you do not desire. You are allowed to testify if you do desire to testify.

The Petitioner: I was going to enter an explanation—it is not so long and it is not so short—of why I changed my mind. I did not at first intend to offer my testimony, but I made a different decision. Whether wise or not I do not know. But I may offer an explanation of why and that may change the picture.

The Court: You do not have to offer an explanation. If you want to testify, you can.

Mr. Karesh: I would tell him, however, Mr. McDonald, that you are not represented by coun-

sel, but we will, of course, [63] cross examine you about any criminal record that you may have, your criminal background, if His Honor feels your criminal record is relevant, whereas if you do not take the stand, we won't go into that.

The Petitioner: Ordinarily in a criminal trial they view a criminal record as relevant, but in a habeas corpus proceeding that is not the issue and is not material, in my opinion.

The Court: As soon as you offer yourself as a witness, you may be impeached. They may impeach your testimony by showing prior criminal convictions.

Mr. Karesh: And if I may say this—I believe I can do it—I am merely explaining that to you. It was my understanding you wanted to go up on the record. I have no objection as to your taking the stand. You have your right to do that, but I want to tell you what we intend doing.

The Petitioner: I have no fear from the facts of the case if justice is administered according to the law. I am an innocent man and fear no questions, but, as you say, a previous conviction may have a direct bearing——

The Court: On whether I am to believe you or not.

The Petitioner: On the credibility of the witness. It is true I place great reliance—in fact, practically all reliance on the depositions—but when the Circuit Court reversed my case, this question arose, *Walker v. Johnston*. [64]

The Court: That is a matter of argument; that is not a matter of testimony.

The Petitioner: I see.

Mr. Karesh: Walker v. Johnston does not say if you hold a hearing, the petitioner has to testify.

The Petitioner: That is right. Well, I will take the fatalistic view I have always taken. I will decline to testify and stand on the evidence I have offered. I won't decline. I have not decided to act as a witness for myself.

Mr. Karesh: Then I think the case is ended.

The Court: I think there should be some argument on it.

Mr. Karesh: Does the petitioner rest?

The Petitioner: The argument——

Mr. Karesh: I mean as far as testimony is concerned, do you have any other documents or testimony?

The Petitioner: No, sir.

Mr. Karesh: May I consult the agent?

The Court: Yes.

Mr. Karesh: We have no evidence to offer. Our documents are in. Does counsel wish to argue or does he wish to leave it to Your Honor?

The Court: Let me see what I have before me: the deposition of Moinet, the deposition of Curran, the deposition of Babcock, the proceedings by reference in the case of McDonald v. Hudspeth, 129 Fed. 2d 196, and 157 Fed. 2d. 275. [65]

Mr. Karesh: The opinion of this Circuit overruling Judge St. Sure.

The Court: Yes. That is the only litigation that you desire to refer to me to?

Mr. Karesh: Yes.

The Court: Will you make any argument that you desire to make? --

The Petitioner: Yes, sir.

(Thereupon the matter was argued to the Court.)

CERTIFICATE OF REPORTER

I, official reporter, certify that the foregoing transcript of 18 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: Filed Sept. 20, 1948. [66]

EXHIBIT A

The Deposition of the Honorable Edward J. Moinet, United States District Judge, Eastern District of Michigan, Southern Division, taken on behalf of the Respondent, pursuant to attached agreement, before A. W. Estabrook, shorthand reporter, and Malcolm Shaw, Deputy Clerk of the Court, duly authorized and empowered to administer oaths, on Thursday, June 26, 1941, at three

Exhibit "A"—(Continued)

o'clock p.m., in the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, appearing on behalf of Respondent. [67]

EDWARD J. MOINET,

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Deputy Clerk of the Court, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name, please?

A. Edward J. Moinet.

Q. Where do you reside?

A. Detroit, Michigan.

Q. What is your occupation and profession?

A. United States District Judge for the Eastern District of Michigan.

Q. How long have you been United States District Judge for the Eastern District?

A. Since June 13, 1927.

Q. And at the present time you are District Judge of that district?

A. I am one of the five.

Q. Judge, do you recall the cases of Otto Barnowski and Walter McDonald, which were tried in 1939 in your Court, wherein Barnowski and Mc-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

Donald were charged with violation of the law, with robbery of National Banks?

A. What is the question, do I recall?

Q. Do you recall it?

A. I do; the case was tried before me.

Q. Judge, is it your custom to take notice of [68] the various cases that you try, your own personal notes? A. I do.

Q. And you have those notes here with you, do you, Judge? A. I have.

Q. Judge, without asking you detailed questions about the case, I would like to have you state in the record what your notes show in connection with the case, generally.

A. My notes show the title of the cause, and the number, and the attorneys, United States attorneys appearing for the Government and the attorney appearing for the defendants; the drawing of a jury, and the number of challenges and the names of the jurors excused; the opening statement of counsel for the Government and the opening statement of counsel for defendants; and the names of all of the witnesses sworn by the Government and for the defendants, and notes of their evidence as given.

Q. Now, Judge, do you recall, on the opening day of the trial, do you recall whether or not an attorney named George F. Curran appeared on behalf of both these men in your Court?

A. I do, and the order showed that he had entered his appearance, right in the file, there, with

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the Clerk of the Court, as attorney for the defendants, for each defendant.

Q. Now, in connection with Mr. Curran being attorney for the two petitioners, who were the defendants in your Court on the opening morning of [69] the trial, was any request made to you, Judge, by either McDonald or Barnowski, that you appoint new counsel for them? A. There was not.

Q. Was there any request made by Barnowski or McDonald or by Curran their lawyer, that you continue the case on that morning, a formal request? A. No.

Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake not, the jury was drawn and sworn, McDonald said that he had some little disagreement with his attorney.

Q. Did he state the nature of that disagreement?

A. He did not; and the Court waited for some time for him to advise the Court of the nature of the difficulty. Mr. Curran said nothing and nothing further was said by McDonald or Barnowski in reference to the particular subject.

Q. So that you were never informed that morning, or at any subsequent time, as to what the nature of the alleged difficulties between Barnowski and McDonald and their counsel was?

A. I was not.

Q. Had anything been said in the Court that

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

morning by McDonald or Curran, his attorney, to the effect that McDonald and Barnowski had filed any charges with the Bar or Bar Association of Michigan against their attorney, George Curran?

A. There was not; and I never heard of the subject until yesterday and that was from you and the United States Attorney who tried the case, Mr. Babcock.

Q. Now, Judge, I believe that prior to the day of the opening of the trial of Barnowski and McDonald in Michigan, they had also been arraigned before you some time prior to that on the complaint, due to the fact that, as I understand it, Mr. Hurd, the Commissioner, was out of the state and on sickness in Florida, is that right?

A. Yes.

Q. And at that time, the time they were arraigned on that complaint, did Mr. George Curran appear before you on that hearing?

A. He appeared before me serving as a Commissioner, and that was when, that was a long time before the trial, several months before the trial.

Q. You had had no complaint, no formal written request from either Barnowski or McDonald requesting the appointment of counsel, had you, at any time? A. I had not.

Q. Now, in connection with Mr. Barnowski, on the morning that the trial opened, did Mr. Barnowski make any statement whatever to you about his difficulties, or any difficulties with Mr. Curran?

A. He did not; there was no claim made that

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

there was any difficulties between Barnowski and the counsel.

Q. So that I take it that on the morning of [71] the trial, you had no personal knowledge or other information was furnished you by anybody to the effect that there was any personal difficulties between Barnowski and his counsel Curran?

A. No, sir.

Q. And the only statement that was made in court in your presence as to any difficulties that McDonald had with Curran was, as you have already testified, the mere statement that there had been difficulties? A. Yes.

Q. No explanations were offered and no formal motion for continuance was asked at that time?

A. No.

Q. And no formal motion for appointment of new counsel was asked by either petitioner?

A. No, sir.

Q. Now, Judge Moinet, the petitioner having—

A. (Interposing). Well, wait a minute. There was no request ever made to this Court by either of the defendants or by their counsel that the government procure for them certain witnesses or subpoena and bring into Court certain witnesses. Also, Mr. Curran proceeded to try the case; the defendants swore and introduced the testimony of eight witnesses in their defense; that defense applied to both defendants as to their whereabouts upon the day in question, at or about the time it was alleged the bank was robbed, and the matter

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

was thoroughly argued to the jury, both by the government and by the defendants' counsel [72] Curran; and so far as I am able to observe Mr. Curran tried this case in a very able manner, and seemed to use his very best efforts in presenting the defense for the defendants.

Q. And during the course and progress of this trial were any complaints made to you by either defendant as to the conduct of their counsel throughout the course of the trial?

A. There was not.

Q. Was there any information given you that the defendants requested that any witnesses be subpoenaed at the expense of the government?

A. There was not, and if they had made that request and shown their inability to procure such witnesses, I would have made an order that those witnesses be subpoenaed and presented in Court at the expense of the government.

Q. And if any information had been conveyed to you on the morning that Court opened in the trial of the case to the effect that either of these petitioners had personal difficulties with his counsel or had stated to the effect that they could not proceed with that counsel, would you have granted them a continuance or at least looked into the matter with the idea of appointing new counsel for them?

A. If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and if I had been satis-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

fied that their difficulties were of such a nature [73] that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel.

Q. And as I take it from your testimony, there was nothing whatever that was said in the Court Room that morning, and no statement made by either petitioner or by their counsel that gave you any indication or idea that any such situation existed between them and counsel? A. No, sir.

Q. Judge Moinet, in the District of Kansas, McDonald testified in substance as follows:

He testified that on the opening of this case he arose in open court in the morning and stated in substance that he had had difficulties with his counsel. That you, in answer to that question, asked Mr. Babcock if Mr. Curran appeared formally as counsel. Mr. Babcock in reply to this question, stated that Mr. Curran had formally filed his appearance. Mr. McDonald further stated that on hearing Mr. Babcock say this, then you said, 'The trial will proceed.'

Mr. McDonald then says that upon your saying that the trial will proceed, that he, the petitioner McDonald, rose and said further, in substance, to you, that he had personal difficulties with his counsel, Mr. Curran, in that he had filed, he, McDonald,

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

had filed charges with the State Bar Association of Michigan against Curran, and that he and Curran— [74] that Curran could not competently represent him, and he stated further that he then formally asked you to appoint other counsel.

Judge, did Walter McDonald make those statements to you in open court on the morning that the trial convened?

A. He positively did not. The subject was never mentioned.

Q. And the first intimation you had of any such statement is my stating it to you here?

A. Today, yes, sir.

Mr. Davis: Judge Moinet, under stipulation filed in the District of Kansas in this case, McDonald, Barnowski, and their counsel appointed in Kansas, and myself, have stipulated that they might file written interrogatories, to be asked of you at the time this deposition was taken. I will ask you questions that they have forwarded to me in pursuance of the stipulation.

Cross Examination

(Interrogatories Read by Mr. Davis.)

Q. Did you receive a letter or letters from defendants McDonald and Barnowski in cause Number 24742? A. Yes.

Q. State in detail the content.

Mr. Davis: The Government suggests that copies of the letters which you state you have received

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

be made under your supervision and that such copies be attached to the deposition in lieu of the originals.

A. Yes. Well, here they are. (Papers to counsel.) Let me say that on September 7, 1938, I received a letter from McDonald while he was confined in Milan jail, copy of which is attached.

On September 18, 1938, I received a letter from Barnowski while he was confined in Milan Jail. That was before the trial, September, 1938, a copy of which follows. On July 29, 1940, I received from Barnowski a letter from Leavenworth, Kansas, copy of which follows:

Mr. Davis: The three letters that you have mentioned and which—copies of which are now incorporated into the record, are those the only letters you have received from these petitioners, Judge?

A. They are.

Mr. Davis: The next question that the petitioners have in their list is this question:

Q. Is it true, as the court records attest, that over 125 cases were given priority over case Number 24742?

A. I don't know as to the specific number. I know that there were many criminal cases pending and many more were accumulating. These criminal cases were being tried as fast as it was possible to dispose of them according to the ordinary business of this court.

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

Mr. Davis: So that the interest of the public [76] as well as the interest of the defendants in these cases was taken into consideration by the court in disposing of the business, is that true?

A. It certainly was.

Q. Was any motion or formal pleading ever filed by either petitioner that ever came to your attention, Judge, in which they moved the Court for an immediate trial, that is, I am speaking of a formal pleading? A. No.

Q. No such pleading filed. The next question is in regard to the 125 cases. 'If so, do you approve of this preferential practice?'

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial: no proper foundation laid for the 'preferential practice' referred to in the question.

A. There was no preferential practice; the cases were taken up in their ordinary course.

Q. 'If not, why was it permitted?' The answer is already in. Seven. Did either defendant make a statement before sentence was imposed?

A. They did not. The records show that before sentence was imposed they were asked if they had anything to say before sentence was imposed, and they said nothing.

Q. If so, state in substance. You have already answered that. Were they given an opportunity to make a statement? A. They were.

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

Q. If not, why not. I think that is answered. Eight, is it true that defendant Barnowski wrote [77] you a letter from the Detention Farm in Milan, Michigan, requesting you to appoint counsel for them?

A. I received a letter from him, as already set forth, but he made no request to appoint counsel.

Q. Did you answer that letter?

A. I don't think I did.

Q. If so, when? A. Well——

Q. Your answer was a foregone conclusion. If not, why not?

A. I referred those letters from Barnowski and from McDonald to Mr. Babcock, the Chief Assistant United States Attorney, and was advised by him that these cases would be taken up as soon as it was possible, having in mind the enormous number of cases then pending in this court, and cases prior to this case referred to.

Q. Next question: Is it true that you criticized a friend of said defendants for trying to bring their witnesses to court for them?

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial, no basis laid.

A. It is positively not true and I never knew and I don't know now that any friend brought any witnesses to court for the defendants. There were no requests to charge presented to the court

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

on behalf of the defendants and the court gave a full and complete charge, as is usual in all criminal cases, [78] fully protecting the rights of the respondents upon trial.

Q. Judge Moinet, at the time or shortly prior to the time the case of Barnowski and McDonald was called for trial in your court had the court been engaged in a very extended case involving the Securities and Exchange Act?

A. Yes, I had been engaged in the trial of the Securities and Exchange case and it took up the time of this court for thirteen continuous weeks, a jury trial.

Q. And before that, Judge, had you been engaged in the trial of some litigation involving some drain proceedings? A. Yes.

Q. That were extensive in nature?

A. I have been engaged in different drain proceedings involving the validity of bonds in the sum of six or seven million dollars, in which proceedings the legality of which was challenged by the taxpayers and by the local municipal authorities, and these matters took up the time of the court for many weeks; of which some cases went to the Court of Appeals.

Q. Now, during the extended occupation of the court with these matters, the court has just referred to, at various times had the court had informal discussions with members of the United States Attorney's Office relative to criminal cases that

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

might be pending in the court? A. Yes.

Q. And among those informal conferences does the court recall whether or not it had ever been called to his attention that Barnowski and McDonald were anxious or stated that they were anxious that they were anxious or might indicate that they were anxious for an early disposition of their case?

A. Yes; in their letters that they wrote they indicated that they wanted a trial, but their principal contention was that they wanted to be discharged because they hadn't been provided with a speedy trial.

Q. And as I believe the court has already testified that on the morning of the trial there was no formal motion for a continuance nor for the appointment of counsel nor was anything said in the courtroom by either petitioner or by counsel for the petitioners that would give the court any indication or intimation that these petitioners had any difficulties, serious difficulties with their counsel that would not warrant their counsel proceeding with the case?

A. No, on the contrary, there was nothing said that would lead the court to believe that their trouble was of a serious nature and not only that, but the court observed upon the trial of the case that Mr. Curran, their attorney, tried it in a very masterful manner, as a good lawyer; he protected

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

their rights and the examination, cross-examination, and argument to the jury indicated to me that he used his very best efforts on behalf of the defendants.

Q. And when Mr. McDonald arose and said [80] there had been some difficulties with counsel, that was the only statement that was made to the court in open court that morning?

A. It was, at any time, in or out of court.

Q. And the court did not have then, or does not have now, except what you have been told since then, any idea of what the difficulties between McDonald and counsel were?

A. I don't even know now what the difficulties were, or are.

Q. I see. And you did not deny them the continuance because no continuance was asked for on the morning of the trial? A. No.

Mr. Davis: Thank you very much, Judge. I think that is all I need to bother you with.

EDWARD J. MOINET.

Subscribed and sworn to before me this 23rd day of July, 1941.

MALCOLM SHAW,
Deputy Clerk U. S. District Court, Eastern Dist.
of Mich.

Exhibit "A"—(Continued)

(Copy)

Federal Building Detroit

September 18th, 1938.

From Otto Barnowski—5597

To Hon. Judge Moinet

Dear Sir:

I, am innocent man and a cripple, have been held at—Milan Detention Farm a period of six months for Bank Robbery. [81]

The witnesses in this case State positively that the robbers were not crippled. The evidence adduced by the—F.B.I. agents confirms this inescapable fact.

The United States District attorney possesses this indisputable evidence yet persistently and unreasonably refuses to grant my release or bring me to trial so that I may prove my innocence.

I understand it is the sole duty of the Court to set date for trial, appoint counsel where defendants are indigent, and otherwise supervise and protect the rights of that defendant when said person's rights are subject to be abused or disregarded.

I justly contend that my constitutional rights have been ruthlessly disregarded.

Therefore I appeal to the Court for instant relief from my unlawfully restraint.

I do not present this letter as a suppliant seeking undeserved preferment or favor—But respect-

Exhibit "A"—(Continued)

fully request that you protect my rights, as you have pledged by your oath of office, and immediately release me or insist that I be given a trial.

Thus, Justice only I ask of you who has been appointed to dispense it, and whom I am sure, is broad enough to recognize the fairness of my request.

I trust that a reply will reach me at an early date.

I thank you.

Respectfully,

OTTO BARNOWSKI,

Box 1000—5597 Milan, Mich.

(Copy)

September 7, 1938.

Federal Bldg.

From W. McDonald,

Box 1000—5593, Milan, Mich.

Dear Sir:

I was arrested Mar. 28, for Bank Robbery. Of this crime I am innocent.

On May 18, the F.B.I. investigator visited me at Milan. He stated that I should look forward to favorable action within about two weeks. That was over three months ago.

I would thank you for an immediate interview

Exhibit "A"—(Continued)

so that you may advise me what to do to gain my release.

It is with great reluctance that I burden you with my individual problems. But I have no funds to employ counsel and no knowledge how to proceed in my present dilemma.

I thank you sincerely for any courtesy, you may be pleased to extend.

Respectfully,

WALTER McDONALD. [83]

(Copy)

Leavenworth, Kansas,
July 29, 1940.

Post Office Box 7
Hon. Edward Moinet
Federal Bldg.
Detroit, Michigan.

My dear Judge:

Doubtless you will be surprised at receiving this letter from me, or my assuming the privilege to write but it being a matter of life and liberty to me, I beg of you to spare me enough of your valuable time and undivided attention, to present unquestionable facts furnished by competent Federal Doctors here at Leavenworth prison to more fully aid you in understanding my case more completely in my behalf, viewing it from an unbiased stand-

Exhibit "A"—(Continued)

point, as it has not been correctly presented to you to this date.

I am certain "your honor" is too intelligent to be biased, too powerful to be intimidated, too honest to be corrupted, too sincere to be haphazard and too fair to without the truth.

I am very sure you will be more than glad to listen to my plea if you had the least idea I could show you unquestionably that I am innocent of the crime for which I am sentenced. I know I am innocent of the crime, and am sure you will feel better to have all the facts upon which I rely, which I [84] am now able to produce from the most convincing and the most reliable source.

I shall be glad to have you consider the facts as follow:

You will recall from the facts of the trial, that my conviction was based upon identification made by a lady school teacher who happened to be a customer in the bank at the time of the robbery—All the officials and employers of the bank testified the robbers were masked and this one lady said they were not, and all witnesses including this lady testified that neither of the robbers was crippled.

You will also recall the testimony of the physician Dr. Shallow who furnished evidence of my physical condition. In my opinion it was the testimony of this lady teacher, and the Doctor which caused my conviction.

I can furnish you unquestioned and competent

Exhibit "A"—(Continued)

facts by the highest class and most competent physicians in Leavenworth prison, who has stripped me, and fully examined me to their satisfaction, which facts will controvert fully the testimony of both the above mentioned witnesses. If I can do this, I will strip the whole case of all incriminating evidence against me. If these witnesses for any reason gave untrue testimony then I most assuredly should not be deprived of my liberty and freedom, and should go free.

Dr. Shallow who testified in the case regarding my physical condition among other things said I had action in my crippled knee. Absolutely, upon [85] my word and honor, did not at any time examine me in any manner sufficient to know whether I was crippled or not. My crippled condition is such that I am unable to go to meals and walk in the lines with other inmates, but I am required to enter alone in advance of the others, and to leave in advance of the others.

The rules of this institution will not permit the Doctors to give me written statements, but they advise me that they will gladly give you a full report upon your written request.

If my condition is such that I could not have walked in and out of the bank without anyone noticing it, then the ladies identification must be a gross mistake even how honest she may be in her intentions.

Exhibit "A"—(Continued)

Now Your Honor: I am imploring you, as a dependant citizen of this great and good Government, and as a man who has has freedom taken from him on mistaken identity and erronious testimony to present to your authentic and unimpeachable statement of the facts regarding my crippled condition, as found by the best legal medical talent in the employ of the Government in Leavenworth prison. It is not new facts discovered, but true facts of which it is my first and only opportunity I have had to furnish in my behalf.

Now, your Honor: I am asking you to please reconsider my case, and in the face of these facts, I ask that you reform your judgment in keeping with this correctly derived at facts, which proves [86] beyond a reasonable doubt, that Dr. Shallow did not examine me sufficiently to determine my actual condition, and that the lady who identified me, must of necessity, be mistaken entirely in her testimony as affecting my guilt. I am sure my Government through its public servants desires me to have administered to me equal and full justice as the true facts justify, regardless of the time or under the circumstances which same is developed and presented. This being a matter of full life and liberty to me, I truly ask and pray you to communicate with the following named physicians at the U. S. penitentiary at Leavenworth, Kansas, regarding my condition as a cripple.

No time in the past ten years or more have I

Exhibit "A"—(Continued)

been able to walk without crutches or a strong walking stick as an aid to support me.

You write to Dr. John W. Cronin and Dr. Root, physicians in the hospital here. I have been advised by officials here to first write direct to you as you have full power as trial judge to reconsider my case and reform your judgment in keeping with the facts presented to you.

This will be consistent with what law and justice require.

I am yours for success and happiness.

OTTO BARNOWSKI,
54616, Leavenworth, Kansas.

P. S. Please excuse pencil, as I am not permitted to use a typewriter. [87]

State of Michigan,
County of Wayne—ss.

CERTIFICATE OF COURT STENOGRAPHER

I, A. W. Estabrook, a Court Stenographer in the County and State aforesaid, do hereby certify that the witness Edward J. Moinet, whose deposition was taken before me on behalf of Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Thursday, June 26, 1941, at the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan, was by the Deputy Clerk of the Court first duly sworn to testify to the truth,

Exhibit "A"—(Continued)

the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said deposition then given by said witness was by me reduced to writing, and when completed, the said deposition was read over by him, the said witness, and subscribed by him in my presence, and that the said deposition is a true and correct transcript of the whole of the testimony so given by the said witness as aforesaid.

I do further certify that the said deposition hereto attached was taken at the time and place mentioned and described in the caption and notice contained in said deposition, and in the notice of said deposition which is hereto attached; and that said deposition was taken for the reason that the [88] said witness lives at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the deposition aforesaid to the said Court with my own hand, I have sealed up the same, and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said deposition has been retained in my possession since the taking thereof, and until the same was sealed up by me and delivered to said Court by United States mail as aforesaid.

I do further certify that the respondent, Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time

Exhibit "A"—(Continued)

of the taking of the said deposition by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division, that the petitioners were not represented by counsel nor present at the time of the taking of said deposition. . .

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

A. W. ESTABROOK,

Court Stenographer, 733 Majestic Building, Detroit, Michigan.

Detroit, Michigan, July 24, 1941. [89]

CERTIFICATE OF DEPUTY CLERK

State of Michigan,
County of Wayne—ss.

I, Malcolm Shaw, do hereby certify that I am a deputy clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division, and am duly authorized and empowered to administer oaths.

I further certify that on Thursday, June 26, 1941, at three o'clock p.m., in the office of the Honorable Edward J. Moinet, District Judge, Federal Building, Detroit, Michigan, personally appeared before me the said Honorable Edward J. Moinet, a witness produced on behalf of the respondent in the foregoing entitled cause; that the

Exhibit "A"—(Continued)

witness was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause of aforesaid; that the testimony then given by the said witness was reduced to writing in the presence of said witness by A. W. Estabrook, a competent court stenographer; that the said testimony was then transcribed by the said A. W. Estabrook, and the foregoing and attached twenty-five (25) typewritten sheets constitute a full, true and correct transcript of the testimony so given by the said witness as aforesaid.

I further certify that after the said testimony had been so transcribed, the same was read over by the said witness who did then and there subscribe and again make oath to the same in my presence. [90]

I further certify that I am not counsel for nor related to any of the parties to the foregoing and entitled cause, neither am I interested in the subject-matter or outcome thereof.

MALCOLM SHAW,

Deputy Clerk, United States District Court for
the Eastern District of Michigan, Southern
Division.

Dated at Detroit, Michigan, July, 1941.

[Endorsed]: Filed July 31, 1941. Howard F.
McCue, Clerk. [91]

EXHIBIT "C"

The Depositions of George F. Curran and John W. Babcock, taken on behalf of the Respondent, pursuant to attached agreement, before Eugene Karst, a Notary Public within and for the County of Wayne and State of Michigan, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, Appearing on behalf of Respondent.

GEORGE F. CURRAN

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please?

A. My name is George F. Curran. [92]

Q. Where do you reside, Mr. Curran?

A. My residence, 3471 Courville Avenue, Detroit, Michigan.

Q. What is your business or profession?

A. I am an attorney, licensed to practice in the State of Michigan.

Q. And do you have offices in the City of Detroit?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. My office is located at 1701 Ford Building, in the City of Detroit.

Q. And how long have you been admitted to the Bar of Michigan?

A. I have been admitted to the Bar of Michigan since August—no, since September of 1922.

Q. And you are a member of the Bar of the Supreme Court of Michigan? A. I am.

Q. And of what other courts are you a member admitted to practice in?

A. I am admitted to practice in the District Court, United States District Court.

Q. For the District of Michigan?

A. Southern Division; I was admitted in the Southern Division of the Eastern District.

Q. Do you recall the case of Walter McDonald and Otto Barnowski, which was filed in the United States District Court, the Eastern District of Michigan, No. 24,742? A. I do.

Q. Mr. Curran, when did you first know either Barnowski or McDonald—meet them?

A. I first met McDonald approximately a year before they were arrested—I knew McDonald approximately a year before he was arrested on this charge. The charge I am speaking of is the robbery of the Farmington Bank.

Q. And had you ever acted as his attorney prior to the bank robbery charge? A. I had.

Q. On more than one occasion?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. On two prior occasions.

Q. On two prior occasions; and had you met—when did you first meet Barnowski, if you recall, to the best of your recollection?

A. I am not so sure, but I believe it was just prior to the issuance of the warrant in that Farmington Bank robbery.

Q. Just prior to that time. And were you employed by McDonald and Barnowski to represent them on the bank robbery charges in this district?

A. You refer to the case that was tried?

Q. I refer to the case. I will withdraw the question and ask you this question: Mr. Curran, will you state in your own words your employment by McDonald and Barnowski, and the steps you took in their case, from the first?

A. I was called and advised that Mr. McDonald was in custody of the Detroit Police Department. I contacted Mr. McDonald and arranged, or tried to arrange for his release. He was finally turned over to the Federal authorities on this robbery of the Farmington Bank. During that time I had [94] contact with Mr. McDonald and I appeared at the arraignment before Judge Moinet for him.

Q. At McDonald's request?

A. Yes. He also informed me that a friend of his, Otto Barnowski, had been arrested, and I proceeded to try and effect Barnowski's release. However, the police officers—I believe it was the State

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Police, Michigan State Police—took Otto Barnowski from the Detroit Police Department out to the Oakland County Jail at Pontiac. And there Barnowski called me through an attorney, Mr. Wilson. He had retained Mr. Wilson to get a writ of habeas corpus for him, and he also wanted me to come out there. I made two trips to Pontiac at Mr. Barnowski's request and filed—when they were just about to release him, some woman identified Barnowski and he was brought down and arraigned on the warrant in this Farmington robbery. I appeared at the arraignment in the Federal Court for him on that matter, which also I believe was before Judge Moinet.

Q. At his request?

A. At his request. I was not paid, and I dropped out of the picture; and when the case came up for trial before Judge Moinet, there was some question as to Barnowski and McDonald wanting me to appear for them.

Q. Now, pardon me, but prior to the date of the trial—we will go back to that—did you make a trip to Milan, the detention farm at Milan, to see [95] Barnowski and McDonald, prior to the time they were tried in the Federal Court here?

A. I did.

Q. Will you state the circumstances relating to that trip and the purpose of that trip?

A. I received a telegram from Walter McDon-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

ald, who was then held at Milan, Michigan, the detention farm. Mr. McDonald, in his telegram, stated to me that if I would come out there he would pay me for my trip out there. I went out there and he paid me \$25 for the trip and to apply on past services. The purpose of Mr. McDonald wanting me to come out there was to try and effect an early trial of his case. He had been in custody some months at that time. He wanted me to secure a writ of habeas corpus, and so that he could receive an early trial I came in and I talked with Judge Moinet and also the District Attorney, and was advised that there were other cases, that had been pending prior to McDonald's and Barnowski's case, ahead of us, and just as soon as their case could be reached it would be tried, which they estimated at that time, I believe, was around thirty days. So I didn't secure a writ of habeas corpus, as Mr. McDonald and Barnowski wanted, because I could see as it would serve no purpose.

Q. Mr. Curran, both Mr. McDonald and Mr. Barnowski have testified in this case in Kansas, and both petitioners, in their testimony and in their petition for the writ of habeas corpus herein state in substance that the \$25 they paid you on that [96] occasion was for the purpose solely of filing a writ of habeas corpus and was not for the purpose of paying your expenses out to Milan and back, or

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

for past services. What is the fact? What was the \$25 for, Mr. Curran?

A. The \$25 was paid for services that had been rendered and also for the trip. I have the telegram, I believe, still in my files, showing that they agreed to pay me if I would come out to Milan.

Q. If you would come out to Milan?

A. Now, I received no other compensation except the \$25 for my trip to Milan—my expenses to Milan, which took a good half day.

Q. Mr. Curran, if you should be able to find that telegram in your files upon your return to your office, would you forward it to the reporter so it could be attached as Government's Exhibit 1 in this deposition?

A. I am sure I will be able to find it, and I will be glad to give it to you.

Q. Now, Mr. Curran——

A. Wait just a minute. Off the record——

(Discussion off the record.)

A. I am furnishing this on the basis that it is understood that that is not confidential communication between attorney and client, but if the Court who will pass upon these depositions should decide that it is, then it can be stricken.

Q. All right; fine. That is a good way to put it. Now, Mr. Curran, when you were at Milan, and in [97] addition to discussing the habeas corpus case or the early trial of their case, did you have an under-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

standing with McDonald and Barnowski that you would represent them when they were tried, or did they question your representing them when they were tried?

A. Well, it was understood—I can't give you—

Q. What was your understanding of the matter?

A. It was my understanding that I was to try the case, and because of the fact that I had started on the case I was not going to let them down merely because I hadn't been paid.

Q. And did you assume, from the fact that they had wired you to come to Milan and paid your expenses for coming and going, that you were still representing them? A. I did.

Q. Now, did you visit them at Milan on more than one occasion, Mr. Curran?

A. Well, now, I wouldn't say. I remember twice that I was out there, but I wouldn't say I was there three times or not.

Q. Your best recollection is you were there on two occasions?

A. Two occasions, and I may have been there three times; I wouldn't say. Of course, if the records are there, why, that is right.

Q. Yes, I appreciate that. In your appearing for McDonald and Barnowski at the arraignment and on the proceedings up to this point, had [98]

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

you discussed their case generally with them as a lawyer would with prospective clients, or clients, and discussed the merits of their defense, and so forth?

A. We had discussed the case in a general way; we hadn't gone into details as to witnesses who might be obtained. Their contention, of course, was there was not much to discuss, that they knew nothing about the robbery, and that is why I say it was discussed just in a general way, their defense.

Q. Now, Mr. Curran, when did you see these men next; that is, prior to the day they were tried? I believe the trial started in January of 1939. Did you see them shortly before the trial convened, at the County Jail?

A. I think I saw them a day or two before the trial convened, at the county jail.

Q. And will you state what conversation or arrangements you had with them at that time?

A. Well, there was a little bit strained feeling between McDonald and myself at that time. We did not have an awful lot of conversation. I merely informed them that I would be in court the following day, as I had filed an appearance and would have to be there.

Q. And when you filed your formal appearance, Mr. Curran—I believe the record will show it was on January 10th, and I believe the trial con-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

vened on January 24th—when you filed that formal appearance, [99] was it your understanding that you were still acting as attorney for these two men?

A. It was my understanding that I was. While I hadn't been paid, I was willing to go through with it. I had gotten into the picture and I was willing to see it through.

Q. Had you been notified by either Barnowski or McDonald at any time that they did not want your services?

A. The only time that there was any mention of that directly was in Judge Moinet's courtroom the morning of the trial.

Q. Now, before we get to that point, Mr. Curran, did you ask or discuss with Barnowski and McDonald, at the county jail, before they were tried, their case, as to what witnesses they wanted, and so forth, or was any discussion had along those lines?

A. There was some discussion in general: not as to what witnesses they wanted, but in the general discussion of their case. For example, they said they couldn't—in explaining they couldn't be guilty, they said that there was a woman who operated I believe a laundry, who would testify that at the time of the robbery that they were in the laundry, or one of them was, and then the other one was supposed to have been in a garage; but I

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

don't believe the names of any particular people were mentioned. Places were mentioned more than names. [100]

Q. Now, at this time, when you talked to them in the county jail and had this discussion with them as you have related about their case, was anything said by either McDonald or Barnowski that they did not want you to represent them in the trial of the case?

A. I don't remember a thing in the county jail or prior to the trial being said to that effect.

Q. Now, Mr. Curran, state what you recall as to what conversation took place in the courtroom on the morning the trial convened.

A. On the morning the trial convened, I believed the first step was I asked for an adjournment and the Court refused to grant an adjournment. McDonald then got up and walked up to the Bench, and his conversation to the Court, or statement to the Court, was to the effect that there had been some differences between him and myself and that they had filed a complaint with the State Bar of Michigan based upon the fact that I had not obtained a writ of habeas corpus for them, which, as I said before, I didn't feel would have served any purpose, and that was the reason I didn't obtain it; and that they didn't wish me to proceed with the case. The Judge asked me if I had filed

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

an appearance and I stated I had, and the trial Judge stated that the trial would go on.

Q. Now, did you represent them throughout the trial, Mr. Curran? A. I did.

Q. Did you cause any subpoenas to be issued for [101] any witnesses in their behalf, or were any witnesses procured for them?

A. There were witnesses procured.

Q. At your instigation, or how were the witnesses procured, if you recall?

A. Well, that morning they gave me the names and addresses of three or four witnesses that they wanted, and I believe we were able to secure two of those witnesses, and the other witnesses that appeared for them appeared voluntarily.

Q. And did you argue the case, at the conclusion of the case, in their behalf? A. I did.

Q. And after the trial of the case, were you present at the time they were sentenced, if you recall?

A. No, I was not.

Q. You were not. Did you file a motion for a new trial for them? A. I did.

Q. Did you argue that motion? A. I did.

Q. Did you consult with them in regard to the filing of a motion for new trial, Mr. Curran?

A. I did.

Q. And after the motion for a new trial was overruled, did you take any steps to perfect an appeal?

A. No, I did not.

Q. You did not. Did you have any discussion with Barnowski or McDonald in regard to an appeal?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. Well, there was some discussion as to appealing, but it was based upon the fact that [102] Barnowski's relatives would advance the cost and fee for the appeal, which they never did.

Q. Now, I might state, Mr. Curran, that Barnowski has testified in the case in Kansas to the effect that you secured the sum of one hundred dollars from his mother, for the purposes of perfecting an appeal. What are the facts in that regard?

A. That sum of money was paid me for the purpose of filing a motion for a new trial, and the receipt that was given to Barnowski—Barnowski's brother, I believe—will so show.

Q. Mr. Curran, had you been paid any other money for your services in defending these men in the trial?

A. Outside of the \$25 which I was paid for my trip to Milan, and the hundred dollars which was paid for the motion for a new trial, I received no compensation whatsoever for any work done—the trial, consultation, any work—from Barnowski or McDonald, or anyone in their behalf.

Q. Mr. Curran, did you have any conversation with Mr. Babcock of the United States Attorney's office, or contact him in regard to securing an early trial for McDonald and Barnowski, at any time prior to the trial?

A. As I stated before, when I came back from Milan, I first checked up with the trial judge and also the District Attorney's office, Mr. Babcock,

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

through Mr. Babcock, and it was Mr. Babcock's [103] information that he was in the trial of a case at that time, criminal trial, that was pending before the Barnowski and McDonald case was pending, and there was one other case, I believe, that he had to try before the McDonald and Barnowski case was to be tried, and immediately upon the conclusion of that case, he would try the McDonald and Barnowski case.

Q. You recall whether or not the case Mr. Babcock referred to was the Securities & Exchange case that lasted some eleven weeks?

A. It was. There were a number of defendants—there were, oh, upwards of six to twelve defendants in that case. I was not interested in the case but I know that there were a number of defendants in the case.

Q. Now, Mr. Curran, in regard to the charges filed with the Michigan Bar Association against you by McDonald, will you state what the facts are in regard to that and what disposition was made of that matter?

A. Well, I filed a return—or, rather, possibly I should say a statement, showing my side of the case, and the charges were dismissed by the State Bar Association.

Q. Do you recall whether they were dismissed before the trial of the Barnowski case, or after the trial?

A. That I don't remember; I wouldn't say.

Q. Now, on the morning of the trial, when [104]

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

the trial convened before Judge Moinet, was any formal motion for continuance filed in writing?

A. There was no formal motion for continuance.

Q. Was there any formal motion filed by the petitioners for other counsel?

A. No, no motion—formal motion, written motion—was filed by anyone that morning.

Q. And you had not discussed the matter of the charges filed against you by McDonald with them prior to going into the courtroom that morning, or they had not discussed it with you, is that correct?

A. That is right.

Q. And it was your——

A. (Interposing) In regard to your question whether those charges were dismissed by the Bar Association after the trial, I am certain now that it was after; I would almost say definitely it was after the trial of this case that that happened.

Q. I see. Now, in your representing these men in the trial of this case, Mr. Curran, did you give them the benefit of your best services, in accordance with your oath as a member of the Bar of the State of Michigan?

A. I did. There were, of course, investigations that could have been accomplished had we had any money to do it, but there was no money to do anything, and I didn't advance any money for these men; but as far as services rendered, I did everything I possibly could to give them the benefit of a fair trial. [105]

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. And do you have an opinion as to whether or not they had a fair trial in the courtroom?

A. It is a question of whether my viewpoint of the law coincides with the trial judge's. I may be wrong, and I wouldn't want to state on that.

Q. The matter you refer to in your answer is a question of interpretation of rulings of the Court on law?

A. Rulings of the Court on law.

Q. But outside of the fact that the rulings did not perhaps agree with your conception of the law, were they granted a fair trial as to procedure and given a full opportunity to present their defense?

A. They were.

Mr. Davis: Now, Mr. Curran, the petitioners have filed a set of interrogatories or questions that they desire to ask of you, and I will ask those at this time. Off the record——

(Discussion off the record.)

Cross Examination

Q. The first question they desire to ask, Mr. Curran, is: Were you ever retained by McDonald or Barnowski to defend either or both of them in case No. 24,742?

A. I was never paid a retainer fee, but I was promised fees by the defendants, Barnowski and McDonald, which I was never paid, to represent them. [106]

Q. The next question is: If so, when?

A. I think my previous answer answers that question.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. By whom?

A. I still think that that is answered by the first answer.

Q. What was the agreement?

A. When I was first called by Mr. McDonald, we discussed not my representing them so much as effecting their release, because it was their contention at first that they were not guilty, and consequently they didn't anticipate a warrant being issued.

Q. What was your fee?

A. I have received no fee.

Q. When were you paid?

A. I was not paid at any time outside of the \$25 for the trip to Milan and the hundred dollars for the filing of the motion for a new trial.

Q. If you were not hired by either defendant, did the Court appoint you as counsel for either or both of said defendants in cause No. 24,742?

A. No, the Court did not appoint me.

Q. If so, by what Judge were you appointed? That is already answered, I take it.

A. Yes.

Q. On what date? That is already answered.

A. Yes.

Q. Did you represent either or both defendants when arraigned on their warrant?

A. I did. [107]

Q. If so, whom did you represent?

A. Otto Barnowski and Walter McDonald.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. On what date?

A. That I can't give you. I would have to consult the court file showing the date of the arraignment, which I believe were both held before Judge Moinet. Walter McDonald was arraigned approximately a week prior to the date of the arraignment of Otto Barnowski.

Q. Were said defendants given a hearing or examination before Commissioner Stanley Hurd?

A. They were not, because they were scheduled to have an examination, but the day before the examination the District Attorney presented the facts to the United States Grand Jury and an indictment was returned, which obviated the necessity of an examination.

Q. Did you represent said defendants when arraigned on indictment 24,742?

A. At this time I can't tell you whether I was present in the court at that time or not.

Q. Was the indictment read?

A. That I don't remember.

Q. Were you requested to interview either of said defendants in the United States detention farm at Milan, Michigan? A. I was.

Q. Did you interview them? A. I did.

Q. On what date?

A. I can't give you the exact date at this time. I would think it was somewhere in the neighborhood [108] of October or November of—what year was that?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. 1938. A. 1938.

Q. Is it true that Warden Ryan interviewed you immediately after your arrival?

A. No, I interviewed Warden Ryan because of certain accusations that were made by the prisoners as to their treatment in the prison.

Q. Is it true that Warden Ryan instructed you to warn McDonald and Barnowski that they better not get convicted or it will be too bad for them?

A. There was some discussion by the Warden that they had not been very good prisoners, and that in the event that they were convicted they could not expect the best treatment, or some such statement to that effect.

Q. State exactly of what said defendants consulted you during said interview?

A. Both defendants consulted me during that interview.

Q. Did you make any agreement with said defendants at that time? If so, of what nature?

A. That has been—I would rather answer that question because of the argument over this writ of habeas corpus, so it will be clear. We discussed the question at that time of why they were being held so long at the detention farm, and their claim was that the Government didn't have any case against them and didn't want to take time to try it. I advised them that if such was the case, that [109] we could secure a speedy trial by having a writ of habeas corpus issued, and I stated that if that was

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

the case, that I would do that. Then, as I have stated before in this examination, I consulted with the Judge and also with the District Attorney, Mr. Babcock, who informed me that just as soon as the cases that were pending prior to the defendants' cases—these defendants' cases, McDonald and Barnowski—had been disposed of, that the defendants, McDonald and Barnowski, would be tried on the indictment upon which they were then being held. I so advised them by letter, and that is the reason that no writ of habeas corpus was ever issued.

Q. The various records show that you visited said defendants at the United States detention farm at Milan, Michigan, on October 5, 1938. At any time succeeding this date, and until January 23, 1939, did you see either of said defendants or have any verbal or written intercourse, except the letter written to McDonald dated October 14, 1938, with said defendants of any nature or by any means whatsoever?

A. I believe that I saw the defendants once after that, at the detention farm, and it is my recollection that I also wrote a letter to them. Between what date is that?

Q. October 5, 1938, and January 23, 1939.

A. And I also saw the defendants at the Wayne County Jail. [110]

Q. On what date did defendant McDonald file a complaint against you before the Michigan bar?

A. That was sometime in December, I believe.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Is it true that a letter you wrote to McDonald, dated October 14, 1938, repudiating an agreement made with him on October 5, 1938, was the basis upon which his complaint before the Michigan State Bar was founded?

A. I did not repudiate any agreement with Mr. McDonald made at any time.

Q. On what date did the Michigan State Bar hear this complaint?

A. There never was any hearing on it, as far as I know.

Q. Is it true that you acted as defense counsel in the United States District Court for said complainants against you before the Michigan State Bar, while their said complaint was pending against you before the Michigan State Bar?

A. I believe that is true.

Q. On what date did you officially file with the United States Clerk, Mr. George M. Read, an appearance as defense counsel in case No. 24,742?

A. January 10th.

Q. Had you consulted either defendant about such proposed action? If so, when? By what means?

A. I had never discussed with them, any more than I ever discussed with any other client, the filing of an appearance, the formal filing of an appearance; but it was my understanding I was to represent them, and it was upon that understanding that I filed the appearance.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Did you notify said defendants of your filing said appearance? If so, when?

A. I don't believe I did.

Q. Is it true that you never had any contact with said defendants personally or in writing, except by letter of October 14th to McDonald, from October 5, 1938, until the proceeding and trial, January 23, 1939?

A. That has been answered before.

Q. When you encountered McDonald in the Wayne County Jail on the evening of January 23, 1939, was Attorney George Fitzgerald conferring with him?

A. Well, Mr. Fitzgerald was either there, or had been there, and it was based upon the fact that some friend of Mr. McDonald's had sent him in there.

Q. Is it true that McDonald stated to you at that time that you could not competently defend him because of your pending trial before the Michigan State Bar on his complaint.

A. I don't remember of any such conversation.

Q. Is it true that you advised McDonald that he would have to enter his objections to the Court?

A. There was some talk the date of the trial about my representing Mr. McDonald, and I told him at that time that I could not and would not ask [112] to be discharged from the case, but that if he wanted he could so advise the Court, which he did.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. Did the Court grant his request?

A. It did not.

Q. Is it true that McDonald rose a second time to protest and was ordered by the Judge to sit down? A. I don't recall that.

Q. Is it true that when the trial began of this said cause, on January 24, 1939, that you moved the Court for a postponement, so that you could prepare a proper structure of defense?

A. That is true.

Q. Was the motion granted? A. No.

Q. During your connection with this said cause, were you ever instructed by said defendants to consult any court official regarding their case? If so, by what defendant? At what time? For what purpose? A. I don't recall.

Q. How many times did you consult Prosecutor Babcock to urge an early trial of said cause?

A. I believe I only saw him twice on this case.

Q. At any time during your connections with said case, did said defendants inform you that they had witnesses to be heard in their behalf?

A. They stated that there were witnesses that could be secured.

Q. Did you file a witness praecipe with the Court for witnesses to be subpoenaed in their behalf?

A. I secured subpoenas for the Court for witnesses, [113] witnesses whom they claim could aid them in their defense.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Were you present when the jury returned its verdict? A. I was.

Q. If so, did you poll the jury? A. No.

Q. If not, why not?

A. Because I didn't think it was necessary.

Q. Were you present when petitioners were sentenced? A. No.

Q. If so, did the Court permit either defendant to make a statement?

A. I am unable to say because I was not present.

Q. Was a statement made by either defendant?

A. I don't know.

Q. Which defendant? A. I don't know.

Q. Did you file a motion for a new trial?

A. I did.

Q. If so, on what date?

A. It was two days after the sentence, whatever date the sentence was.

Q. Was it denied? A. It was.

Q. On what date?

A. Well, the motion had been adjourned several weeks and finally was denied by the trial judge.

Q. Were you paid to file an appeal in this said cause? A. No.

Q. How much, and by whom?

A. I was paid no money by anyone to file an appeal in this cause. [114]

Q. Did defendant Barnowski's relatives pay you any money? A. They did.

Q. When, and for what purpose?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. I believe it was around the 25th—they were not sentenced on the 25th?

Q. 26th of January.

A. About the 25th of January; I was paid a hundred dollars to file a motion for a new trial by Otto Barnowski's relatives.

Q. Was it denied? A. It was.

Q. Did you write a letter directed to defendant Barnowski at the United States Penitentiary at Leavenworth, Kansas, under date of May 3, 1939, with a request of two hundred dollars to further finance his appeal? A. I believe I did.

Q. Is it true that the legal time limit for filing of appeal expired March 18, 1939?

A. I don't remember the dates that this took place.

Q. Is it true that you never filed a notice of appeal in the case No. 24,742?

A. I believe that is right.

Mr. Davis: Redirect examination.

Redirect Examination

By Mr. Davis:

Q. The reason you didn't file an appeal, Mr. Curran, as I understand your testimony, is the fact that you were not paid to do so?

A. That is right. [115]

Q. Mr. Curran, prior to the morning the case convened in January—I believe it was January 24, 1939—I believe you have stated that you had no

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

information or instructions from either defendant to withdraw as their attorney, other than the statement that was made in the courtroom, as you have testified? A. That is right.

Mr. Davis: Do you want the reporter to submit this and sign it?

Mr. Curran: I will waive my signature.

JOHN BABCOCK

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please.

A. John W. Babcock.

Q. Where do you reside? A. In Detroit.

Q. What is your occupation?

A. Chief Assistant United States Attorney for the Eastern District of Michigan.

Q. And have been——

A. Since May, 1937.

Q. Did you have charge of the case of United States vs. Walter McDonald and Otto Barnowski, No. 24742? A. I did.

Q. Will you state in detail the various steps in connection with the prosecution of the above named defendants?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. On March 30, 1938, a complaint was filed, having been signed by an agent of the Federal Bureau of Investigation before Honorable Edward J. Moinet, United States District Judge, in the absence of the United States Commissioner, and a warrant signed for Walter McDonald by Judge Moinet. Judge Moinet at that time set April 18th as the date hearing before the United States Commissioner. On April 5, 1938, a similar complaint was filed with Judge Moinet, Special Agent Earl L. Richmond of the Federal Bureau of Investigation signing the complaint. Judge Moinet signed a warrant and Barnowski was arrested and arraigned on the warrant. And Judge Moinet also set April 18th as the date for hearing before the Commissioner.

Q. Pardon me; just one question: At the arraignment of both of these petitioners were they represented by counsel?

A. They were represented by Mr. George F. Curran.

Q. Proceed.

A. Subsequently, upon being interviewed by agents of the Federal Bureau of Investigation, and of course as to this I have no personal recollection, [117] but I am just giving the facts as appear from the reports of the Federal Bureau of Investigation in our file, the two defendants told the agents of certain evidence that might—if true, establish their innocence, and in order to permit the

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

complete investigation, with the possibility of establishing their innocence, as claimed by them, the hearings before the Commissioner were continued on April 18th to April 25th, and from April 25th to May 3, 1938.

Between April 25th and May 3, 1938, we determined that the evidence purportedly given to the Federal Bureau of Investigation agents by these two defendants, and investigated by the agents completely, was not reliable and determined to present the matter to the Grand Jury. It was presented on May 3, 1938, and an indictment voted. The indictment was returned and filed with the United States District Court of Michigan on May 4, 1938, and the two defendants arraigned on the indictment on June 10, 1938. At the time of this arraignment both defendants were represented by Mr. George F. Curran, attorney at law. The case was then held pending until January 24, 1939, when the trial commenced.

Q. In connection with the delay, or the interval of time elapsing from the return of the indictment until the trial, will you state what the condition of the docket, the criminal docket, was in this district?

A. The custom and practice among the judges [118] of the Eastern District of Michigan is to make available to the office of the United States Attorney only one judge during any given month, and this was the practice and custom in 1938 and 1939. Also it is the custom and practice in this district to ex-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

cuse the traverse jury during the entire month of August. Consequently we had no jury here during August of 1938. The docket, by reason of our inability to obtain the services of a judge and jury to try our cases, was very crowded, with cases which were instituted for the most part prior to the date of institution of this case No. 24,742.

Q. What was the nature of some of the cases that were taking the time of your office at this time, Mr. Babcock?

A. Well, without checking our statistical records I can't give you the facts for the complete period of time, but by way of example I have a distinct memory of a case of the United States against Norman Barry and others, a case involving mail fraud, conspiracy and violation of the Securities and Exchange Act, in which case, as I recall it now, the indictment was first returned in 1935 or early in 1936, and that was one of the cases which was disposed of or rather, of which disposition was made between the spring of 1938, and the end of that year. In fact, the trial of that case began early in October—I think October 3, 1938, and the trial of that case continued until December 19, 1938.

Q. Mr. Babcock, was the case of Barnowski and [119] McDonald handled as quickly as it could be handled in this district, considering the volume of business and the interests of the public at large?

A. Very definitely it was. The investigation was completed about the time of the return of the in-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

dictment and the case was ready for trial and was tried at the earliest possible moment consistent with the developments of the calendar, in the usual course of events.

Q. Mr. Babcock, when this case came on for trial,—I believe on January 24, 1939—will you state whether or not the petitioners, McDonald and Barnowski, appeared in court that morning with an attorney?

A. They did; they were represented by Mr. George F. Curran.

Q. Do you recall any conversation that occurred at the commencement of the trial relative to any statement made by the petitioner McDonald in court that morning?

A. I remember that when Court opened Judge Moinet asked if we were ready to proceed with the trial, and I advised him the Government was ready to proceed. I don't recall what response Mr. Curran made, but I recall that Mr. McDonald rose from his chair and said to the Court that he had been having some differences with his attorney and desired opportunity to obtain another attorney. But that was all that was said.

Q. Was a formal motion filed by either McDonald [120] or Barnowski for the appointment of other counsel? A. No, sir.

Q. Was a formal motion made by either McDonald or Barnowski or Curran, their attorney, for a continuance of the case?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. No formal motion in writing. Now that you mention the matter of continuance, I do recall that Mr. Curran stated that either that very morning or the evening before the defendants had named to him several people whom they desired to have subpoenaed as witnesses, and he did request a continuance for the purpose of subpoenaing these parties as witnesses.

Q. Were those witnesses later produced in Court?

A. I do not know. The names of the parties were not given to the Court or to anyone else.

Q. Now, was the trial proceeded with then?

A. Yes, sir. Incidentally, I am very certain that no exception was taken to the Court's denial of the informal motion for continuance.

Q. Did the Government put on its evidence then? A. Yes, sir.

Q. And then did the defendants put on their evidence? A. Yes.

Q. Have witnesses appear in their behalf?

A. Oh, yes.

Q. The case was argued by both sides?

A. Yes, sir.

Q. The jury instructed? A. Yes, sir.

Q. Retired, and returned a verdict of guilty?

A. Yes, sir.

Q. Mr. Babcock, did you at any time have any conferences with Mr. George Curran, attorney for Barnowski and McDonald, prior to the date of the

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

trial, in regard to their securing an early trial in the case?

A. I remember very distinctly that I had one, and it may be possible that he might have telephoned me a few times on other occasions, but on only one occasion did he come over to the office to see me.

Q. And in that conversation did you explain the condition of the docket, as you have already testified here, to Mr. Curran?

A. I did, Mr. Curran advised me that he had been requested by Barnowski and McDonald to petition for a writ of habeas corpus to protest their detention at Milan because of the delay of the trial. I told him we, of course, would do nothing to prevent his suing out the writ of habeas corpus, but that the condition of the docket, the criminal docket, was such that the case just could not be brought on for trial, at least not at that particular moment, because at the time of our conversation the prosecution of the Norman Barry case was in progress.

Q. Now, Mr. Babcock, in connection with the morning the trial convened, did Mr. McDonald or did anybody in the courtroom state what the details [122] of the alleged differences were between McDonald and Mr. Curran to the Court?

A. No, sir.

Q. Was anything said by Mr. McDonald or Mr. Curran, or Mr. Barnowski, to the effect that they

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

had filed charges before the Michigan Bar against Mr. Curran? A. I don't recall that.

Mr. Davis: Mr. Babcock, the petitioners have filed written interrogatories to be asked of you at this time. I will ask them now.

Cross Examination

Q. Is it true that Earl Richmond had charge of the investigation in case 24,742?

A. I don't know. Mr. Richmond, one agent D. L. McCormack, and Special Agent L. K. Cook of the Federal Bureau of Investigation all participated in the investigation.

Q. When was said investigation concluded?

A. I think I should answer that by saying when the trial was over, in view of the fact that all our investigations continue constantly until the conclusion of the trial.

Q. When was Richmond transferred out of the Eastern District of Michigan?

A. I do not know.

Q. Is it true that the reason said cause was not tried according to its docket number was because all witnesses refused to identify said defendants at that time? A. That is not so. [123]

Q. Why did you refuse to permit Richmond to give said defendants the lie detector test?

A. I did not refuse.

Q. Why were 125 cases advanced to be heard at the expense of the priority enjoyed by case No. 24,742?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. I do not know that 125 cases were advanced, or that any cases were advanced.

Q. Why did you have said case continued before the United States Commissioner until an indictment was returned?

A. Because the defendants, as I was advised, had requested the Federal Bureau of Investigation agents to make certain investigations which the defendants thought would establish their innocence, and both the Federal Bureau of Investigation and our office were as anxious to establish their innocence, if that was a fact, as we were to establish their guilt, if that was a fact.

Q. Did you ever talk with attorney Morris Weller about this said cause?

A. I do not recall ever having a conversation with Morris Weller or knowing the gentleman at all.

Q. If so, state in detail the substance of said conversation. That is answered, I take it, by your former answer. Did you ever have any conversation with attorney George Fitzgerald about said defendants?

A. I do not recall having a conversation with Mr. Fitzgerald about this case. [124]

Q. State the substance of said conversation. I take it that is answered by the former question?

A. That is right.

Q. Did Attorney Curran, in November, 1938, complain to you about Attorney George Fitzgerald taking active interest in securing a writ of habeas corpus for said defendants?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. I do not recall that he did.

Q. State the facts concerning this conflict of interest and what part you had in it.

A. I do not recall any conflict of interest and know that I had no part in any such conflict, if any such conflict existed.

Q. Did you talk the matter over with attorney George Fitzgerald in your office?

A. I do not recall ever doing so.

Q. Did you settle this misunderstanding?

A. I certainly did not settle any misunderstanding.

Q. Did you advise Attorney Fitzgerald not to interfere in this said cause, as defendants did not have any money anyway?

A. I did not.

Q. Did you receive a letter from defendant Barnowski, while he was confined in the United States detention farm at Milan, Michigan?

A. The file of our office indicates that a letter was written to me by a Barnowski on November 17, 1938.

Q. If so, why was this request ignored?

A. As I recall it, it was about this same time [125] that Mr. Curran called on me to take up the question of bringing the case on for trial, and the letter was not ignored because I felt it was answered by my conversation with his attorney.

Q. Why did you personally prevent him from obtaining his own physician to testify as to his physical deformity?

A. I did not.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. Isn't it a fact that you personally made a secret agreement with Attorney George Curran whereby he was to be present at said defendants' trial to conform to legal requirements, but to make a feeble attempt only to defend said defendants, so as to insure a conviction, regardless of what methods he "choose" to employ? A. It is not.

Redirect Examination

My Mr. Davis:

Q. Mr. Babcock, do you have an opinion as to whether Barnowski and McDonald had a fair trial in their case in your district?

A. I am convinced they did.

Mr. Davis: I think that is about everything. Do you want to waive your signature?

Mr. Babcock: I will waive it. [126]

State of Michigan,
County of Wayne—ss.

CERTIFICATE OF NOTARY PUBLIC

I, Eugene Karst, a Notary Public in and for said County and State aforesaid, duly commissioned and qualified, do hereby certify that the witnesses George F. Curran and John W. Babcock, whose depositions were taken before me on behalf of Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Wayne County,

Exhibit "C"—(Continued)

Michigan, were by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said depositions then given by said witnesses was by me reduced to writing, and the said depositions are true and correct transcripts of the whole of the testimony so given by the said witnesses as aforesaid.

I further certify that the signatures to said testimony were waived by counsel for the Respondent and by said witnesses.

The documents referred to in the testimony of George F. Curran was delivered to me and marked Government's Exhibit 1, and it attached hereto.

I do further certify that the said depositions hereto attached were taken at the time and place mentioned and described in the caption and notice [127] contained in said depositions and the notice of said depositions which is hereto attached; and that said depositions were taken for the reason that the said witnesses live at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the depositions aforesaid to the said Court with my own hand, I have sealed up the same and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said depositions have been retained in my possession since the taking thereof, and until the same were sealed up by me and delivered to said Court by United States mail as aforesaid.

Exhibit "C"—(Continued)

I do further certify that the respondent, Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time of the taking of the said depositions by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division; and that petitioners Walter McDonald and Otto Barnowski were not represented by counsel nor present at the time of the taking of said depositions.

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

In Witness Whereof, I have hereunto set my [128] hand and seal at Detroit, County of Wayne and State of Michigan, this 7th day of July, A.D. 1941.

EUGENE KARST,
Notary Public, Wayne County, Michigan. My commission expires Jan. 17, 1944.

[Endorsed]: Filed June 13, 1945. C. W. Calbreath, Clerk. [129]

RESPONDENT'S EXHIBIT "A"

Vio: Title 12, Sec. 588 (B) a, (b), USC, Banking Act of 1935, as amended.

United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division

Of the March Term, A. D., 1938

CR-24742

Eastern District of Michigan,
Southern Division—ss.

The Grand Jurors of the United States of America empaneled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That heretofore, on or about the 25th day of March, A. D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias [130] Otto Baranowski, late of the City of Detroit, Michigan, hereinafter referred to as defendants, did, by force and violence, and by putting in fear, unlawfully, wilfully, knowingly and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper, officers and employees of the Farmington State Bank, a banking corporation organized and doing business under the laws of the State

Respondent's Exhibit "A"—(Continued)
of Michigan, and a member bank of the Federal Reserve System, and an insured bank in the Federal Deposit Insurance Corporation, certain monies, to-wit: the sum of five thousand eighty and 50/100 (\$5,080.50) Dollars, lawful money of the United States of America, the exact denominations of the certificates, currency and coin comprising the sum aforesaid being to these Grand Jurors unknown, which said sum of money, at the time it was so robbed, stolen and taken by the defendants as aforesaid, belonged to and was in the care, custody, control, management and possession of a certain bank, to-wit: the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation, and a member bank in the Federal Reserve System; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter [131] McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to com-

Respondent's Exhibit "A"—(Continued)

omit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly, and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of Howard C. Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, [132] late of the City of Detroit, Michigan, on or about the 25th day of March, A. D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and

Respondent's Exhibit "A"—(Continued)
feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of G. Irene Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FOURTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the [133] Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, con-

Respondent's Exhibit "A"—(Continued)

trol, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of Arvale Tipper, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FIFTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense [134] hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the

Respondent's Exhibit "A"—(Continued)
life of Mary Elizabeth Berry, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

SIXTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, Alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously. rob, [135] steal and take from the possession of Howard G. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, and control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the life of Robert J. Stewart, by the use of dangerous weapons, to-wit: pistols and revolvers: Contrary to the form, force and effect of the Act

Respondent's Exhibit "A"—(Continued)
of Congress in such case made and provided and
against the peace and dignity of the United States.

JOHN C. LEHR,
United States Attorney,

JOHN W. BABCOCK,
Assistant United States Attorney, Eastern District
of Michigan.

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division.

At a Session of the District Court of the United
States for the Eastern District of Michigan, con-
tinued and held pursuant to adjournment at the
District Court Room, in the City of Detroit, in
said District on Friday, the tenth day of June, in
the year of our Lord one thousand nine hundred
and thirty-eight. [136]

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias Walter
Lewis, alias Walter McDougal, alias William Mc-
Donnell, alias Walter Parkins, alias Walter Per-
kins, being present in Court and being arraigned
on the indictment heretofore filed against him,

Respondent's Exhibit "A"—(Continued)
waives the reading thereof and pleads not guilty
to the charges in said indictment contained.

Thereupon the Court does now fix the bail of
said defendant at the sum of \$50,000.00.

EDWARD J. MOINET,
U. S. District Judge.

United States of America, in the District Court of
the United States, for the Eastern District of
Michigan, Southern Division.

At a Session of the District Court of the United
States for the Eastern District of Michigan, con-
tinued and held pursuant to adjournment at the
District Court Room in the City of Detroit, in said
District, on Wednesday, the twenty-fifth day of
January, in the year of our Lord one thousand nine
hundred and thirty-nine.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

In this cause, the jurors heretofore empaneled
[137] and sworn, come into Court again and sit to-
gether, and after hearing the conclusion of the evi-
dence in the case, the arguments of counsel, and the
charge of the Court, retire under the charge of the
officer duly sworn for that purpose to consider of
their verdict to be rendered; and after being absent
for a time come into Court again and say upon
their oaths that defendants, Walter McDonald,

Respondent's Exhibit "A"—(Continued)

alias, and Otto Barnowski, alias, are guilty as charged.

Thereupon said jurors are excused from further consideration of this case, and the Court do now here order the sentence of said defendants deferred to tomorrow, January 26, 1939, and said defendants remanded into the custody of the United States Marshal.

EDWARD J. MOINET,
U. S. District Judge.

At a Session of the United States District Court for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit in said District on Thursday, the twenty-sixth day of January, A.D. 1939.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias, being present in Court, and being represented by [138] counsel, and having been found guilty by Jury, of the charges in said indictment contained, and now being before the Bar of the Court for sentence, and inquired of by the Court if he had anything to say why sentence should not be imposed, and the Court having fully considered all that said defendant had to say in his behalf, thereupon the Court does now sentence the said defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias

Respondent's Exhibit "A"—(Continued)
William McDonnell, alias Walter Parkins, alias Walter Perkins, to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term and period of thirty-five (35) years, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a Jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such Jail or other place of detention.

/s/ EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.

By JOHN W. BABCOCK,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 26, 1939. [139]

Respondent's Exhibit "A"—(Continued)

United States of America, in the District Court of
the United States for the Eastern District of
Michigan, Southern Division.

[Title of Cause.]

At a session of said Court held in the Federal
Building in the City of Detroit, this 21st day of
October, A.D. 1943.

Present: Honorable Edward J. Moinet,
United States District Judge.

In the matter above entitled, the defendant, after
due and proper trial was found guilty of the
charges in the indictment by verdict of jury re-
turned January 25, 1939, and the judgment of this
Court was entered January 26, 1939, committing
said defendant to the custody of the Attorney Gen-
eral for imprisonment for the term of thirty-five
years. It now appearing to the Court that said
judgment and sentence was void and by Order
entered upon motion of the United States Attorney
has been vacated and set aside, the said defendant,
Walter McDonald, is now present in Court for the
purpose of re-sentence.

The said defendant, Walter McDonald, now be-
ing before the Bar of the Court for sentence, and
having been now asked whether he has anything to
say why judgment should not be pronounced against
him, and no sufficient cause to the contrary being
shown or appearing to the Court, It Is By the Court
[140] Ordered and Adjudged that the defendant,
having been found guilty of said offenses, is hereby

Respondent's Exhibit "A"—(Continued)
committed to the custody of the Attorney General or his authorized representative consequent upon the verdict of guilty of the charges alleged in Count Two of the indictment filed herein, for the period of twenty-five (25) years from and including this day, for imprisonment in a penitentiary.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ EDWARD J. MOINET,
United States District Judge.

Approved as to form:

/s/ JOHN W. BABCOCK,
Assistant U. S. Attorney.

CRIMINAL DOCKET

Docket 24742

[Title of Cause.]

1938. Proceedings.

May 4—Indictment filed. Report of vote of Grand Jurors filed. [141]

June 10—Defendant Walter McDonald arraigned, Indictment read, pleads Not Guilty. Bond fixed \$50,000.00. Remanded to custody Moinet J. Defendant Otto Barnowski arraigned. Indictment read. Pleads Not Guilty. Bond fixed at \$50,000.00. Remanded to custody Moinet J.

Respondent's Exhibit "A"—(Continued)

1939.

- Jan. 11—Appearance of Defendant Walter McDonald by George F. Curran, Attorney, filed. Appearance of defendant Otto Barnowski by George F. Curran, Attorney, filed.
- Jan. 20—Subpoena to Mary Elizabeth Beery rtd served January 18, 1939 filed.
- Jan. 24—Jury trial begins. Jurors impaneled and sworn. Witnesses sworn. Continued to Jan. 25, 1939. Moinet J.
- Jan. 25—Jury trial resumed. Arguments of Counsel. Charge of the Court.
Verdict: Guilty as charged—both defendants. Sentence deferred to January 26, 1939. Defendants remanded. Moinet J.
- Jan. 26—Defendant Walter McDonald sentenced to imprisonment for 35 years. Moinet J. Commitment issued.
Defendant Otto Barnowski sentenced to imprisonment for 35 years. Moinet J. Commitment issued. [142]
- Jan. 27—Subpoena to Ruth McDowell returned served January 23, 1939. Subpoena to R. J. Steward returned served January 20, 1939 filed.
Subpoena to Irene Knickerbocker, Arvale Tipper and George Wallgast returned served January 20, 1939 filed.
Subpoena to Bernice Smith, retd served Jan. 23, 1939, Ann Sheridan, Alex Costage and William Ekstein returned served January 21, 1939 filed.

Respondent's Exhibit "A"—(Continued)

1939

Subpoena Duces Tecum returned served on Howard C. Knickerbocker, January 20, 1939 filed.

Jan. 28—Motion for New Trial as to Walter McDonald. Hearing February 18, 1939 filed. Motion for New Trial as to Otto Barnowski. Hearing February 13, 1939 filed.

Feb. 20—Answer of the US to Motion for New Trial filed. Hearing on Motion for New Trial continued to February 27, 1939.

Mar. 9—Commitment returned executed by delivering Defendants, Walter McDonald & Otto Barnowski, to Warden U.S. Penitentiary, Leavenworth, Kansas, March 3, 1939, filed.

Mar. 13—Order denying Motions for New Trial entered Moinet J.

June 30—Affidavit of Otto Barnowski filed.

Certified copies issued. [143]

July 5—Affidavit of Walter McDonald.

Certified copies issued.

Oct. 5—Praecipe for certified copies filed, copies issued.

1943.

Jan. 13—Verified Motion for Vacation of Erroneous and Void Sentence of Walter McDonald filed.

June 12—Order Denying Motions of Walter McDonald for vacation of Erroneous and Void Sentence filed and entered. Moinet J. Book 75, Page 234.

Respondent's Exhibit "A"—(Continued)

1943

June 14—Petition for Writ of Habeas Corpus ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 75, Page 269.

Writ of Habeas Corpus Ad Prosequendum issued.

June 30—Petition of Habeas Corpus Ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 76, Page 146.

Writ of Habeas Corpus Ad Prosequendum issued.

July 15—Defendants Response to Government's Petition to vacate Judgment, etc. filed.

Aug. 2—Petition of Walter McDonald to vacate Judgment heard in part and continued without date. Defendant waives counsel at this hearing. Moinet J. [144]

Oct. 14—Certified copies of order of C.C.A. directing clerk to file a transcript of Record filed. Moinet J. Book 80, Page 247.

Oct. 21—Order to set aside Sentence of Walter McDonald filed and entered. Moinet J.

Defendant Walter McDonald sentenced to imprisonment under Count 2, for 25 years. Moinet J. Book 80, Page 461.

Commitment issued.

Oct. 29—Praecipe for additions to Transcript of Record filed.

Respondent's Exhibit "A"—(Continued)

1943.

Dec. 7—Writ of Habeas Corpus Ad Prosequendum returned and filed.

Commitment for Walter McDonald returned and filed.

1944.

Feb. 16.—Mandate and Opinion on appeal of Walter McDonald filed. Moinet J. Book 85, Page 30.

Apr. 3—Petition for Writ of Habeas Corpus Ad Prosequendum filed. Order allowing to be issued entered. Moinet J.

Writ of Habeas Corpus Ad Prosequendum issued for Otto Barnowski—Returnable.

Apr. 13—Hearing on Petition of Otto Baranowski to reduce sentence, Continued to Apr. 20, 1944, so that defendant may secure counsel. Moinet J. [145]

Apr. 20—Hearing on Petition of Otto Baranowski to reduce sentence continued to Apr. 25, 1944. Moinet J.

Order appointing Hugh Francis, Counsel for Otto Barnowski entered. Moinet J. Book, Page

Apr. 25—Motion for Otto Barnowski for correction of sentence filed.

Order setting aside former sentence of Otto Barnowski of Jan. 26, 1939, and sentencing defendant to imprisonment for 25 years to begin on Jan. 26, 1939. Moinet J. Book 87, Page 458.

Respondent's Exhibit "A"—(Continued)

1944

May 2—Writ of Habeas Corpus Ad Prosequendum filed and entered.

United States of America,
Eastern District of Michigan—ss.

I, George M. Read, Clerk of the United States District Court in and for the Eastern District of Michigan, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Plea, Verdict, Sentences (2) Docket Entries in the Matter of the United States of America vs. Walter McDonald, et al. Criminal Docket No. 24742 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto [146] subscribed my name and affixed the seal of the aforesaid Court at Detroit, Michigan, this 22nd day of June, A.D. 1944.

(Seal)

GEORGE M. READ,
Clerk.

ELEANOR VAN LOON,
Deputy Clerk.

Respondent's Exhibit "A"—(Continued)

Department of Justice
Washington

23414

May 15, 1943

To the Warden, U. S. Penitentiary, Leavenworth,
Kansas:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of Walter McDonald, No. 54615, from the U. S. Penitentiary, Leavenworth, Kansas, to the U. S. Penitentiary, Alcatraz, California.

Now, Therefore, you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official [147] in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the Warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him to safely keep until the expiration

Respondent's Exhibit "A"—(Continued)
of his sentence or until he is otherwise discharged
according to law.

By direction of the Attorney General,

JAMES V. BENNETT,
Director, Bureau of Prisons.

/s/ FRANK LOVELAND,
Acting Assistant Director.

Safer Custody

Original.—To be left at institution to which prisoner is transferred.

A True Copy.

By C. W. SUNDSTROM,
Record Clerk, USP,
Alcatraz, Calif.

June 19, 1944. [148]

(Copy)

23414

Record of Court Commitment
Department of Justice

Penal and Correctional Institutions
United States Penitentiary
Alcatraz, California

Inst. Name: Walter McDonald. No. 602-AZ.
Born 10-1-90. Age 53.

Alias Walter McDougal, William McDonnell,
Walter Perkins. Color: Indian.

True Name: Inst. name.

Respondent's Exhibit "A"—(Continued)

Name and number of prior commitments to Fed. inst.: 54615-Leavenworth (same offense).

Offense: National Bank Robbery—armed.

District: E-D-Michigan-Detroit.

Sentence: 25 years.

Costs, Fine: None.

Sentence changed: Oct. 21, 1943. New term 25 Yrs. Sentence changed to 25 yrs. by reason therefor new judg. & commitm't.

Sentenced: Jan. 26, 1939 (Original). Oct. 21, 1943 (Re-sentenced).

Committed to Fed. Inst.: March 3, 1939.

Sentence begins: Jan. 26, 1939.

Eligible for parole: May 25, 1947.

Eligible for conditional release with good time: Feb. 6, 1956* (With forfeit).

When arrested: March 28, 1938. [149]

Where arrested: Detroit, Michigan.

Residence: Detroit, Michigan.

Time in jail before trial: Since arrest.

Rate per mo. good time: 10. Total good time possible: 3000 days.

Eligible for con. ref. with extra good time: Sept. 29, 1955. (With credit of 130 days industrial good time.)

Forfeited good time: November 4, 1942*.

Amount forfeited: *Earned to June 1, 1944: (F) 90 days good time.

Expires full term: January 25, 1964.

Person to be notified in case of serious illness or death:

Respondent's Exhibit "A"—(Continued)

16674 USDB (Ft. Leav. (Military) Ft. Leavenworth, Kans. Name, Phillip Vincenti.

48704, State Penitentiary, Columbus, Ohio, Relation, Friend.

54458, State Penitentiary, Columbus, Ohio, Address 2709 Mt. Elliott, Detroit, Mich.

(Received at Alcatraz, May 20, 1943, in transfer from USP, Leavenworth, Kans.)

Releases and commitments on present sentence other than parole:

3/7/41 To Ct. WHC & return.

3/27/41 to Ct. WHC & return.

7/23/43 To Ct. WHC-Detroit.

11/26/43 Returned to AZ.

3/8/39 Ohio Pen, Columbus, Ohio, Parole violation.

[Endorsed]: Filed July 5, 1944 [150]

District Court of the United States
Northern District of California

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 150 pages, numbered 1 to 150, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Walter McDonald, Petitioner, vs. W. B. Swope, Warden, U. S. Penitentiary, Alcatraz, Calif., Respondent, No. 28210,

Respondent's Exhibit "A"—(Continued)

as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$60.00 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of September, 1948.

(Seal)

C. W. CALBREATH,
Clerk. [151]

[Endorsed]: No. 12044. United States Court of Appeals for the Ninth Circuit. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. Walter McDonald, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 23, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12044

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

STATEMENT OF POINTS TO BE RELIED
ON IN APPEAL AND DESIGNATION OF
CONTENTS OF RECORD TO BE PRINTED

E. B. Swope, Warden of the United States Penitentiary at Alcatraz Island, California, appellant herein, hereby designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon on appeal:

1. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, should have denied the petition for writ of habeas corpus filed by appellee before him.

2. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, erred when he ordered the appellee discharged from the custody of the appellant.

3. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, erred when he found that the appellee had been denied

the effective assistance of counsel during the proceedings before the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, et al., criminal number 24742.

4. That the sentence imposed against appellee by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, et al., criminal number 24742, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed October 20, 1948. Paul P. O'Brien, Clerk.

No. 12,044

IN THE
United States Court of Appeals
For the Ninth Circuit

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellant,

VS.

WALTER McDONALD,

Appellee.

APPELLANT'S OPENING BRIEF.

FRANK J. HENNESSY,

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FILED

DEC 30 1948

PAUL P. O'BRIEN, /
CLERK

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IN THE

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E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellant,

VS.

WALTER McDONALD,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, discharging the appellee from the custody of the appellant. (Tr. 29-50.) Judge Denman (now Chief Judge) entertained the habeas corpus proceedings under the provisions of Title 28 U.S.C.A., Sections 451 to 461, inclusive.

Jurisdiction to review the order of Judge Denman discharging the appellee from the custody of the appellant is now conferred upon this Court by Title 28 U.S.C.A., Section 2253, but at the time the notice of appeal was filed herein such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below discharging appellee from the custody of appellant. (Tr. 29-50.) The appellee, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. 2-6), and thereafter an amended petition for writ of habeas corpus was filed (Tr. 13-19), in which it was alleged, in substance, that appellee was denied his constitutional right of effective assistance of counsel before the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called "the trial Court", and that accordingly his case was governed by the decision of the Supreme Court of the United States in *Glasser v. United States*, 315 U.S. 60, and he was therefore entitled to his discharge from the custody of the appellant, the Warden of the said penitentiary. Judge Denman issued an order to show cause (Tr. 7-8), and the appellant filed a return to order to show cause. (Tr. 21-29.) On the hearing on the order to show cause an amended petition for writ of habeas corpus was filed by appellee, as above indicated (Tr. 13-19), upon which the writ was issued. (Tr. 20 and 8-9.) Appellant filed a return to the writ (Tr. 10-12), and it was stipulated that the amended petition would be deemed appellee's traverse to the return to the writ. (Tr. 54.) Hearing on the writ was had, and the matter was then submitted. (Tr. 53-69.) Thereafter Judge Denman concluded that appellee had been denied the assistance of counsel before the trial Court as contemplated by the *Glasser*

case, supra, and entered his opinion and order discharging the appellee from the custody of the appellant. (Tr. 29-50.) From the order discharging the appellee from his custody the appellant appealed to this Honorable Court. (Tr. 51.)

Prior to the institution of the instant proceedings appellee had filed three petitions for a writ of habeas corpus in which he also alleged that he was denied the effective assistance of counsel, two before the District Court of the United States for the District of Kansas, and one before the District Court of the United States for the Northern District of California. The Kansas Court in both proceedings before it, decided adversely to the petitioner, and on appeal the Court of Appeals for the Tenth Circuit, on July 26, 1940 (*McDonald v. Hudspeth*, 113 F. (2d) 984), and on June 17, 1942, (*McDonald v. Hudspeth*, 129 F. (2d) 196, certiorari denied 317 U.S. 665) affirmed the decisions of the lower Court. In the first proceeding the *Glasser case*, supra, was not before the Court since it was not decided by the Supreme Court until January 19, 1942, although in the second proceeding the applicability of the *Glasser case* was argued. In the Northern District of California, proceedings numbered 24885-S, reported at 62 F. Supp. 830, United States District Judge A. F. St. Sure on September 20, 1945, granted the petition holding the *Glasser case*, supra, to be applicable, and remanded the appellee to the jurisdiction of the trial Court for further proceedings, but on appeal this Honorable Court on August 30, 1946, *Johnston v. McDonald*,

No. 11,210, reported in 157 F. (2d) 275, certiorari denied 329 U.S. 795, reversed Judge St. Sure. Appellee also unsuccessfully sought relief by habeas corpus in the Northern District of California, in case No. 23,414-S, affirmed April 2, 1945, by this Honorable Court, *McDonald v. Johnston*, No. 10,882, 149 F. (2d) 768, but this proceeding is of no moment here since the issue raised therein was unrelated to the allegation of the denial of the effective assistance of counsel. The entire record of all of these aforementioned proceedings were incorporated by reference by appellant in his return to order to show cause (Tr. 21-26) as they were in appellant's return to the writ of habeas corpus. (Tr. 10-12.)

In the return to the writ appellant also incorporated by reference the transcript of record on appeal before the United States Court of Appeals for the Sixth Circuit in case No. 10,581, entitled "*Walter McDonald, Appellant, v. United States of America, Appellee*". In this latter case the Court of Appeals for the Sixth Circuit, on March 1, 1948, F. (2d), affirmed the judgment of the lower Court entered on May 15, 1947, denying petitioner's motion to vacate the judgment, on the ground that he was denied the effective assistance of counsel before the trial Court. During the hearing on the writ, Judge Denman took judicial notice of the memorandum opinion of Judge St. Sure, case No. 24,885-S, 62 F. Supp. 830, the opinion of this Honorable Court reversing Judge St. Sure, *Johnston v. McDonald*, 157 F. (2d) 275, No. 11,210 (Tr. 58-59), and the opinion of the

Court of Appeals for the Tenth Circuit, 129 F. (2d) 196. (Tr. 60.) During the hearing on the writ the appellee did not testify. (Tr. 68.)

The only evidence received by Judge Denman, pursuant to the stipulation between appellant and appellee, inclusive of the orders and opinions above referred to, of which Judge Denman took judicial notice, was all the evidence considered by Judge St. Sure in case No. 24,885-S, *supra*, the identical evidence from which this Honorable Court concluded that the decision of Judge St. Sure was erroneous. This evidence, all documentary, consisted of the following:

Deposition of the Trial Judge, the Honorable Edward J. Moinet (Petitioner-Appellee's Exhibit "A", Tr. 56 and 69-93);

Letter from the Michigan Bar Association to Appellee (Petitioner-Appellee's Exhibit "B", Tr. 57 and Supplemental Transcript, p. 1);

Deposition of defense attorney George F. Curran, and deposition of John W. Babcock, prosecuting attorney (Petitioner - Appellee's Exhibit "C", Tr. 57, 94-118, and 118-130);

Certified copies of record of the trial Court, including the indictment, docket entries, judgment, Alcatraz transfer order, Alcatraz record of Court commitment (Respondent-Appellant's Exhibit "A", Tr. 62-63, and 131-152).¹

¹All the exhibits offered by appellee were originally from the record in the Kansas proceeding, *McDonald v. Hudspeth*, on appeal, 129 F.(2d) 196. In addition to these documents likewise being found in the transcript of record in case No. 11210, 157 F.(2d) 275, on appeal from Judge St. Sure's decision in case No. 24885-S, they were also part of the record before the Supreme Court of the United

At the hearing on the order to show cause, and in his memorandum filed with his return to order to show cause (Tr. 27-29), the appellant unsuccessfully urged Judge Denman, as a Circuit Judge, not to entertain the instant petition, suggesting that in *Bowen v. Johnston*, 55 F. Supp. 340, Judge Denman himself had indicated that in the absence of any extraordinary circumstances it would be an interference with the orderly administration of justice for a Circuit Judge to entertain a petition for writ of habeas corpus before the prisoner had exhausted his remedy before the District Judges, that there were no such extraordinary circumstances present in this case in view of petitioner's past successful experience before a District Judge for the Northern District of California, the Honorable A. F. St. Sure. Appellant also urged at this point that Judge Denman should not once more relitigate the issue of the alleged denial of the effective assistance of counsel, arguing that while *res judicata* does not extend to a decision on habeas corpus refusing to discharge a prisoner, no new issues were presented to justify the issuance of a writ as prayed for. During the hearing on the writ, appellant also insisted that the proceedings constituted an abusive use of the writ (Tr. 60), but Judge Denman found otherwise (Tr. 32), asserting that the instant petition presented "a ground on which the facts were known

States in the October 1946 term, No. 637, in which certiorari was denied. Appellant's exhibit had originally been a part of the proceedings before Judge St. Sure in case No. 23414-S on appeal, 149 F.(2d) 768, later incorporated by reference in Judge St. Sure's proceedings No. 24885-S on appeal, 157 F.(2d) 275.

to petitioner at the time of the filing of the prior two petitions, but concerning which petitioner 'was unaware of the significance of [the] relevant facts'." (Tr. 30.)

QUESTION.

Was the appellee denied the effective assistance of counsel before the trial Court?

CONTENTION OF THE APPELLANT.

The answer to the above stated question is: No.

ARGUMENT.

At the outset appellant concedes that should this Honorable Court agree with him that Judge Denman by entertaining the instant petition had in fact violated the rule which he himself had approved in *Bowen v. Johnston*, supra, such a finding could afford him no redress because the controlling statute permits a Circuit Judge to entertain a petition for writ of habeas corpus even though the District Judges have been bypassed, as were United States District Judges Michael J. Roche, Louis E. Goodman and George B. Harris, by the appellee. Furthermore, if this Honorable Court should also feel that Judge Denman made an abusive use of the writ of habeas corpus by re-litigating, as he did, the issue of the alleged denial

of the effective assistance of counsel, appellant must likewise admit, in view of the absence of the *res judicata* principle to habeas corpus proceedings, that the issuance of the writ was legally proper. Accordingly, appellant, as a strictly legal proposition, can not argue that because the Kansas District Court, the United States Court of Appeals for the Tenth Circuit, the trial Court, and the United States Court of Appeals for the Sixth Circuit, and this Honorable Court, had found that the appellee had not been denied his constitutional right of assistance of counsel, Judge Denman must so find. What the appellant does say, and with great emphasis, is this: If, as here, a Circuit Court, on the basis of certain evidence, decides that a prisoner has not been denied his constitutional right of assistance of counsel before the trial Court, a Judge of that same Circuit, be he a District Judge, or a Circuit Judge, not entertaining appellate jurisdiction, should not, with the same evidence before him in a subsequent proceeding, reach an entirely opposite conclusion, as Judge Denman has done.

Nothing has changed since this Honorable Court reversed the decision of Judge St. Sure. The Supreme Court has enunciated no new legal principles on this score since then. If, as appellant believes, and as this Court found, Judge St. Sure's decision was erroneous, then Judge Denman's decision is likewise erroneous, and it too should be reversed, particularly in light of the fact that in reaching their decisions both Judge St. Sure and Judge Denman relied for authority on the *Glasser case*, *supra*. This Honorable Court did not

find that the alleged grievances of appellee fell within the framework of the *Glasser case*, supra, when it decided Judge St. Sure was wrong. The gravamen of appellee's complaint seems to be that he had had a disagreement with his counsel, that he had preferred charges against him before the Michigan State Bar, that the Court had been informed that there was such a difference, but did not inquire as to its nature, and compelled appellee's trial to proceed.

Is the *Glasser case* applicable to our case at bar?

While the decision in the *Glasser case*, supra, seems to indicate that a defendant is entitled to effective assistance of counsel, it does not follow that the mere fact that he was represented by an attorney against whom he had preferred charges with the Grievance Committee of the State Bar, or that the trial Judge, being informed that there had been a difference between attorney and client, did not inquire into these differences, shows that he did not receive the effective assistance of counsel. In the *Glasser case* the Supreme Court took great pains to point out that Glasser was in fact deprived of competent and effective assistance of counsel by the Court's appointment of his counsel to represent another defendant. Instances occurring during the trial were referred to by the Court to illustrate the prejudice to Glasser through his attorney being required to represent two clients. There is nothing in the record here which shows that anywhere during his trial appellee was prejudiced by having to accept the services of his counsel, or that his attorney did not in fact defend him to the best of

his ability, or that he was injured by the Judge's alleged failure to make inquiry as to the nature of the disagreement between himself and his attorney.

Since Judge Denman has denounced McDonald's attorney, George F. Curran, charged him with deliberately giving false testimony (Tr. 34), suggested that Curran desired his client's conviction so that this conviction would be of assistance to him in defending himself at a malpractice hearing (Tr. 34-35), and inferred that no "self respecting attorney" would have done what he had done (Tr. 42), and since it also appears that the alleged dereliction of Mr. Curran was one of the grounds upon which Judge Denman predicated his decision, appellant calls the attention of this Honorable Court to the fact that the trial Judge who observed Mr. Curran in Court said that he represented his client in a "very masterful manner, as a good lawyer". (Tr. 82.) And in the case of *McDonald v. Hudspeth*, 129 F. (2d) 196, *supra*, on which appellant also strongly relied in urging Judge Denman not to retry the issue of the alleged denial of the effective assistance of counsel, an opinion of which Judge Denman himself took judicial notice (Tr. 60), the Court of Appeals for the Tenth Circuit also approved of Mr. Curran's conduct, a fact which Judge Denman admits, although he minimizes this approval by suggesting that if the Tenth Circuit Court of Appeals had certain testimony before it, such as he had, and its import had been properly presented and appraised, that Court would not have given its approval. (Tr. 46). Yet Curran's deposition, from which Judge

Denman drew such conclusion, was before the Court of Appeals for the Tenth Circuit, as were all the exhibits offered by the appellant and received in evidence in our case at Bar.

To be sure there are times when Mr. Curran's and Judge Moinet's testimony appear to differ, but appellant can not understand, and he says it very respectfully, how Judge Denman accepts as true certain statements made by attorney Curran, and then finds others to be false. For example, Judge Denman, in support of his assumption of what the Court of Appeals for the Tenth Circuit would have done under the circumstances of the instant case, relies on the truth of Curran when he says:

“On the contrary, Curran's testimony before me is that he never filed a notice of appeal, although he felt the court had erred in rulings warranting the appeal.” (Tr. 45, 46),

while at the same time, in asking this Honorable Court not to be controlled by its decision reversing Judge St. Sure he makes, among other things, a finding that he disbelieves Curran's statement that he had requested a continuance of Judge Moinet. (Tr. 42.)

Appellant has thus far in his argument made no mention of Judge Denman's conclusion that “the failure to secure a continuance was as much a denial of due process by the attorney as there was a denial of due process by the Court in *Powell v. Alabama*, 287 U.S. 45 * * *” (Tr. 43), for the reason that nowhere in his petition, or in his amended petition, did appellee claim that his counsel had failed to request

a continuance. As a matter of fact, the only allegation concerning the matter of continuance made by the appellee is in his original petition in these proceedings, where under oath he alleged the very opposite of what Judge Denman found on this score, when he, the appellee stated: "The following morning January 24, 1939, when Court convened attorney Curran made a motion for continuance so that he could prepare a defense"; (Tr. 4), which is the identical statement he also made under oath in his original petition before Judge St. Sure in case No. 24,885-S (*Johnston v. McDonald*, supra, No. 11,210, Tr. 4.)

In other words, is not Judge Denman, in making a finding that Curran did not request a continuance, also branding appellee, who, as above indicated, had sworn twice to the contrary, a perjurer? The question answers itself. Appellant can likewise only fruitlessly conjecture why in the amended petition, the original complaint with relation to the matter of the continuance was abandoned, but all this is immaterial because whether the attorney did or did not request a continuance, or whether he did request such a continuance and the trial Judge denied the request, under the circumstances present here, the appellee, it is respectfully urged, has not been deprived of due process,² as contemplated by *Powell v. Alabama*, supra, cited by Judge Denman.

²"Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact standing alone that a continuance has been denied does not constitute a denial of the assistance of counsel."

Avery v. Alabama, 308 U.S. 444.

During the course of this argument appellant has indicated that he relies strongly on the decision of this Court reversing Judge St. Sure. A reading of Judge Denman's opinion shows that he does not believe this Court would have decided as it did if the matter had been properly presented to it at that time. In his opinion Judge Denman says:

"The Warden also relies on the decision of this Ninth Circuit in *McDonald v. Johnston*, 157 F. (2d) 275. There the court reversed the decision of District Judge St. Sure, who had ordered the petitioner's release and return to Michigan for further proceedings. The ground of the reversal is that the petition failed to state a cause for the writ. The petition was in the same confusion of intermingled allegations and incorporations of testimony as the original petition before me. Nowhere does it claim, as in the amended petition, that it was the failure of Curran to advise the court that his client was prosecuting him and that it was the failure of the court to make certain the nature of the disagreement which constituted the gravamen of the failure to create the constitutional court.

"This is clearly apparent from the following statement at page 276, 'McDonald relies on *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680. There the trial court, over Glasser's objection, appointed an attorney whom Glasser had employed for himself as attorney for Glasser's co-defendant, whose interests conflicted with those of Glasser. In the case at bar, Attorney Curran was employed by both defendants (*McDonald* and *Barnowski*). No attorney

was appointed for either of them. It was not claimed or suggested that their interests conflicted. Hence the Glasser case has no relevancy here.'

"If this is what the petition before that court presented as its ground for relief, that decision is correct. The exact contrary appears in the amended petition before me. No contention is here made of a conflict of interest between petitioner and his co-defendant. As stated, the Glasser case is controlling because of a deeper adverse interest between attorney and client, a personal interest of the attorney under prosecution by his client." (Tr. 46-48.)

But was the petition before Judge St. Sure, or the original petition in our case at bar "a confusion of intermingled allegations"? It is obvious that the answer to that question will be found in the petition itself before Judge St. Sure, a petition identical with the original petition filed before Judge Denman, the pertinent part of which reads as follows:

"The following morning January 26, 1939, when court convened Attorney Curran made a motion for a continuance so that he could prepare a defense; for at no time preceding the trial date had this said attorney notified or consulted with petitioner in an effort to prepare a proper structure of defense. This motion the court denied. Ex. C. p. 15, lines 21 to 26.

"Whereupon petitioner arose and personally requested Judge Moinet in open court for other and unprejudiced counsel. Ex. A. p. 3, line 24; Ex. C. p. 7, line 24; Ex. C. p. 20, line 28. He explained that this attorney, at that instant, was

awaiting trial before the grievance committee of the Michigan State Bar, Ex. B, for professional misconduct; and that petitioner was the prosecuting witness. Ex. C, p. 14, line 12.

“This urgent request the court denied, Ex. C, p. 15, line 17, compelling petitioner to proceed to trial with his personal enemy simulating a defender and without having made any preparation whatsoever for a defense. Ex. C, page 15, lines 21 to 26.” (Transcript of Record in C.C.A. 9 case No. 11,210, pages 4 and 5.)

Appellant emphasizes that the petition was drawn with sufficient clarity to cause Judge St. Sure to grant appellee relief, and fundamentally the issue therein was the same as the issue before Judge Denman, an allegation that the petitioner had complained to the Court about his counsel, that he had filed charges against him with the Bar Association, and that the trial Judge did not make an inquiry concerning the matter. Judge St. Sure's findings of fact in this connection are extremely significant, for he said, in ordering the prisoner's discharge:

“Undisputed facts show that at the trial after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939, and dismissed.

“Petitioner contends that his case is governed by *Glasser v. United States*, 315 U.S. 60.” (Transcript of Record in C.C.A. 9 case No. 11,210, page 73.)

It is also significant that Judge St. Sure in granting the prisoner the relief for which he prayed did so on the following grounds:

“Here we have a layman charged with a serious crime who informs the court that he has had differences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the *Glasser* case. ‘Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald) *Glasser* is disclosed by the record before us.’

“Applying the ruling in the *Glasser* case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the ‘requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.’ *Johnson v. Zerbst*, 304 U.S. 458, 468.” (Transcript of Record in C.C.A. 9 case No. 11,210, page 77.)

We must also not lose sight of the fact that after the petition had been filed before Judge St. Sure he appointed to represent the appellee very able and very competent counsel, Wayne Collins, Esq., an attorney who has appeared with distinction before this Honorable Court as well as before the District Court on many occasions, and it was Mr. Collins who not only appeared for appellee before Judge St. Sure, after the petition had been filed, but also on appeal before this Court, in *Johnston v. McDonald*, supra. (Tr. of Record, C.C.A. 9, No. 11,210, page 72 and page 1.)

Judge Denman speaks of certain allegations made in the amended petition which were not made in the original petition, allegations which he stated considerably strengthen the case of the appellee. But mere allegations in a petition, controverted, of course, by the appellant in his returns, are not evidence. The only evidence that appellant respectfully suggests can be considered by the Court are the exhibits already referred to.

Is this Court to sustain Judge Denman and disregard its decision reversing Judge St. Sure for the reason, as Judge Denman insisted, that the matter was not properly presented, or because petitioner, to quote Judge Denman's own words, "was unaware of the significance of the relevant facts"? (Tr. 30.) Appellant hopes not.

Appellant has said, and appellant repeats, because he considers it important, that there is a difference

between allegations in a petition or an amended petition, and evidence. For example, Judge Denman says that the following facts are "undisputed" (Tr. 32):

"Although petitioner was entitled to believe that his charges against Curran terminated any prior relationship of attorney and client, Curran, without advising petitioner, on January 10, 1939, entered his appearance as petitioner's attorney for his defense under the indictment under which he was subsequently convicted." (Tr. 33.)

Bearing in mind that appellee did not himself testify before Judge Denman (Tr. 68), where is there any evidence that appellee believed that the relationship between himself and Curran had terminated as of the date the charges had been preferred before the Bar Association? If this be so, why the delay of the appellee in making his complaint to the trial Judge until after the jury had been impaneled, until after jeopardy had attached? Where, too, is there evidence to support this finding of Judge Denman: "From Curran's false statements that he 'could not * * * ask to be discharged from the case,' " ? (Tr. 34.) Where is there any evidence that these particular statements are false? Where is there any evidence to support the assertion that this finding is "undisputed" ?

Logically now, the next question is: What is the exact basis on which Judge Denman ordered the appellee's discharge? In one part of his opinion he says:

"His petition before me was amended so that it states for the first time the later realized rea-

sons and facts showing the failure to constitute a constitutional court for the trial in which he was convicted—particularly for the first time realizing that the duty of *his attorney* to tell the court the powerful interest of the attorney adverse to petitioner which made it clear that the attorney was disqualified to represent him. Once stated, the defect in the court protrudes like the ‘sore thumb’ of colloquial speech.” (Tr. 32.)

From this statement one might infer that if there was a disagreement between attorney and client, a powerful disagreement, the client could not possibly be given the effective assistance of counsel. But thereafter Judge Denman seems to qualify this position by stating:

“This does not mean that whenever the court at the beginning of a trial is told a dispute exists between an accused and his attorney that there must be a continuance and a substitution of another attorney. It means no more than that the judge must inquire into the nature of the dispute, as Judge Moinet says he would have done.” (Tr. 41.)

From this latter observation made by Judge Denman, the conclusion might be logically drawn that in his opinion the gravamen of the wrong is the failure of the trial Judge to “inquire into the nature of the dispute.” This conclusion is strengthened by the fact that immediately after making this observation he declares:

“This is what was done by the trial Judge in *United States v. Gutterman*, 147 F. 2d 510

(C.C.A. 2), where Judge Augustus Hand's opinion sets forth all the colloquy showing the nature of the differences between the attorney and client and upheld (Judge Frank dissenting) the trial court's continuance of the trial with that attorney. Similarly the full evidence was stated in *United States v. Mitchell*, 138 F. 2d 83 (C.C.A. 2)." (Tr. 41.)

Appellant has carefully read both of these decisions. In the *Guttermann case*, supra, the trial Judge did make inquiry as to the nature of the disagreement between the attorney and client, but nowhere in this case is there a finding that if such inquiry had not been made the decision of the lower Court would have been reversed. In the *Mitchell case*, supra, however, appellee has been unable to find where such inquiry was made as Judge Denman suggests. In that case, 138 F. (2d) 831,³ it was said by Circuit Judge Clark:

"But we do feel that the court was too hasty, in view of the circumstances here presented, *in stopping the defendant so quickly and, indeed, in not inquiring as to whether there was any reason for the demand.*

"A majority of this court nevertheless feel that no reversal should result, because the complete transcript now presented to us discloses both what was motivating the defendant and the fact that in reality the trial cleared up his objection." (Italics supplied.)

³Judge Denman, in his opinion, has inadvertently cited *United States v. Mitchell* as appearing at 138 F.(2d) 83, instead of at 138 F.(2d) 831, where the opinion is actually reported.

Judge Clark then went on to make this statement, at page 832, which we believe is particularly appropriate for our case at bar:

“After all, a trial should be viewed practically with the purpose of discovering if the ends of justice have actually been achieved. Had the court permitted defendant to make his explanation, the matter of the diary would have been cleared up that much earlier in the day; but it is hardly conceivable that any other result would have followed. With that point as to the diary disclosed and taken care of the court would certainly have discouraged defendant from following the well-nigh suicidal course of attempting to go on with the case alone. His substantial rights having been actually protected reversal is not justified. 28 U.S.C.A. § 391.”

From this language in the *Mitchell case*, we see that not only was no inquiry made by the trial Court herein concerning the difference between attorney and client, but we also see that the test of whether there has been a denial of a substantial right warranting reversal under Title 28 U.S.C.A. Section 391 is what happened during the trial and whether the reason giving rise to the disagreement was such that it could and would prevent a fair trial. Certainly, if Judge Moinet had made an inquiry and determined that the dispute about which appellee complained to the Bar Association was over the sum of \$25.00, which appellee claims was paid to Curran for the purpose of filing of a habeas corpus petition before the trial Court, and which Curran says was

largely paid him as traveling expenses for visiting the appellee while he was imprisoned in a jail in a city other than that in which Curran resided, he would not have, appellant believes, continued the case and appointed new counsel for appellee, or given him time to secure new counsel. Judge Moinet himself suggested that to warrant such action on his part the grievance would have to have been a serious one when he declared in his deposition:

“If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and *if I had been satisfied that their difficulties were of such a nature that in my opinion the counsel could not proceed fairly*, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel.” (Italics supplied.) (Tr. 75-76.)

Let us also not forget that Judge Moinet in his deposition had previously stated that McDonald himself had told him after the jury was drawn and sworn that he had had some *little disagreement with his attorney*. Here we quote verbatim from the record:

“Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake not, the jury was drawn and sworn, McDonald said that he had some little disagreement with his attorney.” (Tr. 72.)

Judge Denman indicated that in his opinion the dispute between Curran and McDonald was much

more serious than the differences between attorney and client in the *Guttermann case* and in the *Mitchell case*, *supra*, when he states:

“In neither case was the difference on where the client could feel that if he were convicted his attorney would be greatly aided in defending his client’s malpractice proceeding against him.” (Tr. 41.)

With this appellant must very respectfully disagree. To him the disputes between attorney and client in the *Guttermann* and *Mitchell cases*, *supra*, are much more marked than in our case at bar. In any event there is no authority for the proposition that if an attorney who has had sharp disagreement with his client represents him in the trial of the case such representation of itself constitutes a denial of the effective assistance of counsel.

In his opinion Judge Denman also says:

“The Warden contends that the Glasser case requires that, despite such disqualification, something more in the way of prejudice must be shown in the preparation for or in the conduct of the trial. In this I cannot agree.” (Tr. 41.)

Appellant does not say that the disagreement between McDonald and Curran constituted a disqualification of Curran, but substituting the word disagreement for the word disqualification appellant does say once more that there must be some prejudice shown in the preparation for, or in the conduct of, the trial before the appellee can consider himself aggrieved. Here it should be mentioned that Curran was familiar

with McDonald's case, having appeared on his behalf some time before the trial at an arraignment on the complaint before Judge Moinet, sitting as a commissioner in the absence of the regular commissioner who was ill. (Tr. 73.)

In *Noble v. Eicher* (C.C.A. D. C.), 143 F. (2d) 1001, the Court seemed to hold that whether there has been a denial of the effective assistance of counsel must be determined by what occurs during the trial, and not by what might have occurred. This likewise seems to be the holding of this Honorable Court in *Danziger v. United States*, 161 F. (2d) 299, at page 301, an opinion written by Judge Healy in which Judge Denman and Judge Orr concurred:

"There was, however, no showing or appearance of prejudice to Danziger growing out of the appointment of his attorney to represent the corporations. *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, is relied on, but the circumstances of that case were markedly different. In addition, the court made the appointment contingent on future developments and told counsel that he would be relieved from the assignment if conflict became apparent. The matter was not again brought up and no further objection on that score was urged at any stage of the trial."

Perhaps this whole case should be resolved in the light of what the Court of Appeals for the District of Columbia said in *Dorsey v. Gill*, 148 F. (2d) 857, at page 876:

“Everyone who is acquainted with the realities of practice knows the desire of some convicted persons to have their cases tried over again and their frequent repudiation of counsel after their hopes for acquittal or for lenient punishment have failed to materialize. It is easy for such a person to rationalize his own wishful thinking—together with hopeful comments of counsel—into a structure of promises, coercion and trickery; to assume incompetency and disinterest or worse, upon the part of counsel. But mere general assertions of incompetency or disinterest do not constitute a *prima facie* showing required by the statute to support a petition for habeas corpus. District attorneys and assigned counsel are officers of the court; licensed to practice, upon proof of character and fitness to perform professional duties. There is a presumption of proper performance of duty by each of them, which requires much more than the allegations of the present case to set the procedure of habeas corpus in motion.”

In the final analysis, however, in asking this Court to reverse Judge Denman, nothing is of greater importance than what this Court said in *Johnston v. McDonald*, 157 F. (2d) 275, in reversing Judge St. Sure, at page 276:

“In this (his fourth) habeas corpus proceeding, McDonald petitioned for the writ on the ground that his sentence was void because, at his (and Barnowski’s) trial, he was denied the assistance of counsel for his defense. Attached to and made part of the petition were copies of three depositions—a deposition of District Judge Edward J. Moinet, who presided at the trial, a depo-

sition of Assistant United States Attorney John W. Babcock, who prosecuted McDonald and Barnowski, and a deposition of Attorney George F. Curran, who defended them. Instead of showing that McDonald was denied the assistance of counsel for his defense, the depositions (which were part of the petition) showed that there was no such denial. Thus it appeared from the petition itself that McDonald was not entitled to the writ. Hence the petition should have been denied.”

Of significance is the fact, and we say it once more, that this Honorable Court had before it in reaching its decision the deposition of Judge Moinet, the deposition of the prosecuting attorney, John W. Babcock, and particularly the deposition of the appellee’s attorney, George F. Curran, from which it was concluded, as above set out: “Instead of showing that McDonald was denied the assistance of counsel for his defense, the depositions (which were part of the petition) showed that there was no such denial.”

In closing this argument appellant would leave with this Honorable Court two pronouncements, the one in *Diggs v. Welch*, 148 F. (2d) 667, certiorari denied 325 U.S. 889:

“Denial of effective assistance of counsel means representation so lacking in competence that it becomes the duty of the court to observe it and correct it.”

and the other by Mr. Justice Frankfurter in his dissenting opinion in the *Glasser case*, *supra*, at page 88:

“It is a commonplace in the administration of justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record.”

CONCLUSION.

In view of the foregoing, it is respectfully urged that this Court should again conclude that the appellee was not denied his constitutional right of assistance of counsel before the trial Court, and that the order of discharge should be reversed, and the case remanded to Judge Denman with directions that he enter a judgment denying the appellee the relief for which he prayed.

Dated, San Francisco, California,
December 30, 1948.

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Attorneys for Appellant.

No. 12,044

IN THE

United States Court of Appeals
For the Ninth Circuit

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

In his brief at page 3 appellee asserts that

“The respondent’s return to the order to show cause (R. 21) admits all the facts alleged in the petition but prays a denial thereof because of prior applications for writs (R. 22) made by the petitioner. The petitioner filed a traverse thereto (amended petition R. 13). Consequently the only defense to the application is that tendered by the return to the order to show cause and this is limited to a question whether the issue raised by the petition is foreclosed by prior applications for writs of habeas corpus.”

This, incidentally, is an issue that appellee unsuccessfully urged before this Honorable Court in *Johnston*

v. McDonald, 11,210, 157 F. (2d) 275, which case was cited by appellant in his opening brief. Appellant reasserts here, as he did in that case, that the mere filing of a petition for a writ of habeas corpus, whether verified or unverified, does not import truth to its allegations nor is such verity imported by the issuance of an order to show cause or by the filing of a return to order to show cause. If a cause of action has been stated in the petition, and any exhibits attached thereto, and there is a factual issue involved, a writ of habeas corpus must of necessity issue, the petitioner produced before the Court and a hearing held so that it may ascertain the truth or falsity of the disputed allegations and draw a proper conclusion from such determination of the facts. If on the other hand, the petition and the attached exhibits do not state a cause of action then the Court may, without issuing the writ, dismiss the petition.

Dorsey v. Gill (CCA-DC), 148 F. (2d) 857, 866, 870, 871;

Walker v. Johnston, 312 U.S. 275, 284.

All this, however, is immaterial in our case at bar because the appellant did not limit, as appellee contends, his request for a denial of the instant application to the argument that the issue had already been decided adversely to appellee in the prior habeas corpus proceedings instituted by him. What the appellant did before Judge Denman was to urge him to deny the petition for writ of habeas corpus on the ground that the issue raised therein had been already decided adversely to the appellee, and failing in this request, he asked for a denial of the petition, after

the writ had issued, on the ground that the evidence adduced during the hearing on the writ before Judge Denman did not warrant the conclusion that the appellee had been denied his constitutional right of assistance of counsel before the trial Court.

Appellee is mistaken when he suggests that the appellant did not deny in his pleadings appellee's complaint that he had been denied his right of assistance of counsel before the trial Court. In this connection we quote from the return to order to show cause, as well as from the return to writ of habeas corpus filed herein. In the return to order to show cause the appellant alleged, among other things, "that the respondent is informed and believes that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that the petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the said trial court". (Tr. 26.) In his return to writ of habeas corpus appellant also made a similar allegation when he declared "that respondent is informed and believes and further alleges that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial court and that the petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the trial court". (Tr. 11.)

Apparently appellee has fallen into error when he seeks to limit the question herein to the issue of whether there is, or is not, an absence of the *res judi-*

cata principle in habeas corpus proceedings. In this connection we quote the language of appellee under the heading "Argument", at page 5 of his opening brief:

"The following argument is predicated solely upon the only defense tendered to the application for the writ. This defense is advanced in the return to the order to show cause (R. 21). It is limited to a question whether the issue raised by the petition is foreclosed by prior applications for the writ."

Thus appellee has devoted himself to a discussion of something that is not in dispute. The appellant concedes herein the absence of the *res judicata* principle in habeas corpus proceedings, and in this connection calls attention to pages 7 and 8 of his opening brief where he made his position in this regard extremely clear. It may be that appellee has misinterpreted what appellant said on these two pages, particularly these remarks of appellant:

"If, as here, a Circuit Court, on the basis of certain evidence, decides that a prisoner has not been denied his constitutional right of assistance of counsel before the trial Court, a Judge of that same Circuit, be he a District Judge, or a Circuit Judge, not entertaining appellate jurisdiction, should not, with the same evidence before him in a subsequent proceeding, reach an entirely opposite conclusion, as Judge Denman has done."

In arguing in this wise, appellant in no way meant to convey the impression that he believes the *res judicata* principle is ~~is~~ applicable to habeas corpus

proceedings, but in making this assertion appellant still insists that Judge Denman should not have decided from certain evidence that appellee had been denied his constitutional right of assistance of counsel before the trial Court when on the basis of that same evidence the Circuit Court, of which he is a member, had in a prior habeas corpus proceeding reversed United States District Judge A. F. St. Sure, who had likewise held that appellee had been denied his constitutional right of assistance of counsel before the trial Court.

CONCLUSION.

To conclude, appellee has failed to discuss the only issue involved in this appeal, and that is the question of whether or not the evidence before Judge Denman properly supported a finding that the appellee had been denied the effective assistance of counsel before the trial Court. Appellant respectfully suggests that if appellee had attempted to meet the issue, that he could not have prevailed, in view of the arguments set forth and authorities cited by appellant in his opening brief.

It is therefore once more respectfully urged that this Honorable Court should conclude that Judge Denman's finding that appellee was denied his constitutional right of assistance of counsel before the trial Court was clearly erroneous and that accordingly the order of discharge should be reversed and the case remanded to Judge Denman with directions that he

enter a judgment denying the appellee relief for which he prayed.

Dated, San Francisco, California,
January 17, 1949.

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